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No. 87-

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

If after a federal court of appeals has entered judgment in a diversity case, but while the case remains *sub judice*, a state intermediate appellate court decides the controlling issue of state law in a manner that conflicts with the judgment of the federal court, should the federal court vacate its judgment and reconsider in order to ensure adherence to applicable state law? *

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* Petitioner Exxon Company, U.S.A., is a division of Exxon Corporation, whose affiliates and partially owned subsidiaries are listed in App. H.

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No. 87-

EXXON COMPANY, U.S.A.,
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v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Exxon Company, U.S.A. ("Exxon"), hereby petitions for a writ of certiorari and asks this Court to vacate the judgment below and remand the case for reconsideration in light of the intervening decision on the controlling issue of Texas law in *Kerr Construction v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, application for writ of error pending).

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 828 F.2d 1121. The opinion of the district court (App. B) is not officially reported but is reprinted at 828 F.2d 1127.

JURISDICTION

The judgment of the court of appeals (App. C) was entered on October 8, 1987. A timely petition for rehearing was denied on December 8, 1987 (App. D). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT

1. In 1981, Exxon and Houston Oil & Refining, Inc. ("Houston Oil"), entered into a contract to make reciprocal deliveries of crude oil. Exxon agreed to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981, and Houston Oil agreed to deliver an equal quantity of crude oil to Exxon "during September through December 1981." App. A at 2a. The contract required Houston Oil to provide an irrevocable standby letter of credit to cover the crude oil being delivered by Exxon. This was standard commercial practice; pursuant to a letter of credit, an issuing bank undertakes to pay a beneficiary (here, Exxon) upon certification that the bank's customer (here, Houston Oil) has failed to perform on an underlying contract.

Houston Oil applied to respondent Banque de Paris et des Pays-Bas ("Paribas") to issue a letter of credit in the amount of $19,530,000.

> Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the

> credit and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

App. A at 3a. A copy of the letter of credit was delivered to Exxon as the beneficiary. *Id.*

The letter of credit that Paribas issued was payable only upon the presentation, *inter alia*, of a signed statement certifying that Houston Oil "has failed to deliver [the crude oil] between September and December, 1981," App. A at 2a, which statement, however, was required to "be presented not later than October 31, 1981." *Id.* at 3a. Paribas itself was aware of "the apparent inconsistency" of these terms, under which "the letter [of credit] expired *on October 31*, yet covered deliveries *between September and December*." *Id.* (emphasis in original). Yet "Paribas never sought to amend the letter to remove the contradiction or to notify Exxon." App. B at 14a.

Exxon delivered 558,000 barrels of crude oil to Houston Oil in July, but Houston Oil made no reciprocal deliveries of crude oil to Exxon in either September or October. In late October, Exxon became aware that the terms of the letter of credit relating to certification and expiration appeared to conflict. In order to remedy this, Exxon asked Houston Oil to have the letter amended to correct the expiration date. Houston Oil represented that it would do so, but in fact it never did. App. A at 4a-5a.

Houston Oil did not make the required reciprocal deliveries of crude oil. "Exxon learned sometime in November that [Houston Oil] was going to default." App. B at 14a. As soon as it was possible for Exxon truthfully to certify that Houston Oil had failed to deliver "between September and December," Exxon requested payment from Paribas on the letter of credit. Paribas

refused payment, contending that Exxon's request was untimely. *Id.*

2. Exxon then instituted this action against Paribas in the 234th Judicial District Court of Harris County, Texas, to recover on the letter of credit. Paribas removed the case to the United States District Court for the Southern District of Texas, where jurisdiction rested on 28 U.S.C. § 1332(a)(2).

The district court ruled for Exxon on cross-motions for summary judgment. The court began its analysis by noting the peculiar manner in which the terms of the letter of credit appeared to cancel out one another and render performance impossible:

> Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that [Houston Oil] failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. . . .
>
> . . . Obviously Exxon could not have certified on October 31 that [Houston Oil] had not delivered through the end of the following two months.

App. B at 13a-14a, 15a.

These considerations, the court reasoned, brought into play two important rules of contract construction under Texas law: "[i]nconsistencies must be resolved against the party who drew the contract," App. B at 14a, and "contracts must be construed to render performance possible." *Id.* at 14a-15a. The court concluded that these rules foreclosed a reading of the letter of credit that would cause the time for presentment to expire before it had become possible for Exxon to certify Houston Oil's failure to deliver. The court also noted that *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W. 2d 713 (Tex. App. ——

Dallas 1986, no writ), involving interpretation of a letter of guaranty, further demonstrated that Texas law would not countenance a construction that would frustrate the parties' essential purpose in securing the letter of credit. App. B at 15a. Accordingly, the court held that Texas law dictated "[a] construction in favor of Exxon." *Id.* at 14a.

3. On October 8, 1987, a divided panel of the Fifth Circuit reversed. The majority implicitly acknowledged that Texas law controlled. *See, e.g.*, App. A at 3a n.2, 6a nn.5 & 7, 7a n.12, 8a n.15, 10a. But treating the specific question before it as a matter of first impression, and drawing largely upon non-Texas authorities with only passing reference to the Texas authorities on which the district court had relied, the majority held "that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date." App. A at 11a.

Judge Garza dissented:

> The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.
>
> I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil . . . still had the months of November and December to return to Exxon the oil that [it] had recevied under the original contract between Houston Oil . . . and Exxon.
>
> I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct.

App. A at 11a-12a.

The court denied a timely petition for rehearing on December 8, 1987. App. D.

4. On November 17, 1987, after the time for filing a petition for rehearing in this case had expired but be-

fore rehearing was denied, the Court of Appeals for the Seventh District of Texas at Amarillo decided precisely the same issue of Texas law in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV.[1] *Kerr Construction*, like this case, involved an effort to recover on a letter of credit with inconsistent terms relating to certification and expiration. But the Texas court, unlike the Fifth Circuit, held that in such circumstances the inconsistent expiry date is unenforceable. The court reasoned that such a letter of credit must be enforced in a sensible manner that grants the beneficiary an opportunity to make presentation for payment after it becomes possible to certify, in accordance with the terms of the certification provision, that the issuer's customer has failed to perform on the underlying contract.

The two cases are on all fours, except as to result. In *Kerr Construction*, the letter of credit had been issued on September 17, 1984, and it provided that presentation for payment was to be accompanied by a signed statement that the issuer's customer had failed to perform on the underlying contract "within ten (10) months," App. E at 22a, *i.e.*, that the customer had failed to complete performance by July 17, 1985. The expiry date, however, was January 1, 1985 (later extended to July 1, 1985). *Id.* at 23a, 24a. The underlying contract remained uncompleted on July 17, 1985, and the beneficiary presented the letter for payment on that date. *Id.* at 24a. The issuer refused payment on the ground that the letter of credit had expired. *Id.*

The Texas court held that the presentation for payment had been timely:

> It is well settled that the rules of construction for ordinary contracts govern letters of credit. It is equally well settled that where there is an irreconcilable conflict between different parts or provisions

[1] The opinion in *Kerr Construction* is reproduced at App. E.

> of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. In this instance, it is undisputed that the first provision of the instrument [relating to certification] is in direct and irreconcilable conflict with the last provision of the instrument [relating to the expiry date] . . .
>
> It [also] is well settled [that] when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration.

App. E at 24a-25a (citations omitted). Because the basic "purpose of the letter of credit was assurance to the [beneficiary]," *id.* at 27a, the court concluded that the express expiry date, which would have rendered such assurance illusory, must give way.

5. Exxon did not become aware of *Kerr Construction* until after the denial of rehearing and issuance of mandate in this case. When it did learn of *Kerr Construction*, Exxon immediately called the decision to the attention of the Fifth Circuit by moving for recall of mandate and for leave to file a suggestion for *en banc* consideration (including a request that the issue be certified to the Texas Supreme Court).[2] Both motions were denied on February 12, 1988. App. F and G.

REASONS FOR GRANTING THE WRIT

This case calls for the exercise of this Court's supervisory authority over the administration of federal diversity jurisdiction. The intervening decision by the state

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[2] In the Fifth Circuit, " '[a] suggestion for rehearing *en banc* will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.' " *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985), quoting from the Internal Operating Procedures of the Fifth Circuit.

appellate court in *Kerr Construction* demonstrates that the Fifth Circuit misapplied Texas law. The Fifth Circuit's failure to reconsider and to correct this error, once brought to its attention while the case was still *sub judice*, conflicts both with this Court's decision in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), and with the decision of the Second Circuit in *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied sub nom. Addabbo v. Curtiss-Wright Corp.*, 400 U.S. 829 (1970). This Court should grant certiorari, vacate the judgment below, and remand with instructions that the Fifth Circuit reconsider in light of *Kerr Construction*.

1. A federal court exercising diversity jurisdiction must follow and apply state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). "In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

The federal court's duty to follow state law does not expire with initial entry of judgment. It continues as long as the diversity case remains *sub judice*:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision Statute in accordance with the then controlling decision of the highest state court.

Vandenbark v. Owens-Illinois Co., 311 U.S. 538, 543 (1941). In *Vandenbark*, the Court had been concerned with the effect of a change in state law occurring after entry of judgment in a district court but before the initial disposition of the case on appeal. But in *Huddleston*

the Court made clear that the principle stated in *Vandenbark* also applies when the change in state law occurs after the federal court of appeals has entered judgment: the federal court is obligated to correct its judgment to conform to the newly announced state rule.

The facts in *Huddleston* were similar to those here. In a diversity case involving Oklahoma law, the Tenth Circuit had entered judgment based upon its "examination of Oklahoma authorities." 322 U.S. at 234. The following sequence of events then occurred:

> Petitioners filed a timely petition for rehearing which was denied on September 1, 1943. On December 17, 1943, petitioners moved for leave to file a second petition for rehearing which the Circuit Court of Appeals denied. In that second petition, petitioners brought to the attention of the court and relied upon an opinion of the Supreme Court of Oklahoma in *Wilson v. City of Hollis*, . . . which had superseded its earlier opinion on which the Circuit Court of Appeals had relied in its opinion in this case.

Id. at 235. Because the court of appeals had failed to amend its judgment to reflect the intervening decision in *Wilson*, this Court granted certiorari, "vacate[d] the judgment below and remand[ed] the cause to the Circuit Court of Appeals so that it may reconsider its decision in the light of the decisions and opinions of the Supreme Court of Oklahoma in the *Wilson* and later cases." *Id.* at 237-38.

In view of *Huddleston*, the proper course of action for federal courts of appeals in cases like this is that charted by the Second Circuit in *Braniff*. There, judgment initially had been entered in May, 1969, and rehearing was denied in June. Three weeks later, the Florida Supreme Court "reversed the intermediate appellate court decision on which we had relied." 424 F.2d at 429. The losing party in the Second Circuit discovered the intervening Florida decision only after filing a petition for

certiorari; while that petition was pending, the party moved in the Second Circuit for leave to file a petition for rehearing out of time. In a carefully reasoned opinion, the Second Circuit determined that it was obligated to reconsider its prior judgment:

> In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was "*sub judice*" the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term "*sub judice*" might be. Under circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, *see* F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice we should consider what effect the Florida Supreme Court's [intervening] decision . . . will have on our prior judgment in this case.

Id. at 429-30.

The Fifth Circuit's failure to undertake reconsideration in this case is inconsistent with this Court's disposition of *Huddleston* and conflicts with the action and reasoning of the Second Circuit in *Braniff*.

2. Fidelity to the *Erie* principle requires federal courts sitting in diversity cases to follow the decisions of a state's intermediate appellate courts in the absence of persuasive evidence that the state's highest court would decide otherwise. *E.g.*, *West v. American T & T Co.*, 311 U.S. 223, 237 (1940); *Six Companies v. Highway District*, 311 U.S. 180, 188 (1940). The decision of the intermediate appellate court in *Kerr Construction* follows and fits comfortably within existing Texas precedent. It therefore stands as the controlling statement of Texas law for purposes of this diversity litigation.

Under Texas law, "letters of credit are subject to the same rules of construction that apply to ordinary contracts." App. B at 14a, *citing Temple-Eastex, Inc. v. Addison Bank*, 672 S.W. 2d 793, 798 (Tex. 1984). Because the primary concern in interpreting any contract is to determine the true intentions of the parties, *e.g.*, *Gracia v. RC Cola-7 Up Bottling, Inc.*, 667 S.W. 2d 517, 520 (Tex. 1984), "[i]f two constructions are possible, a construction rendering the contract possible of performance will be peferred to one that renders its performance impossible or meaningless." *Temple-Eastex*, 672 S.W. 2d at 798. This rule of construction dictated the result in *Kerr Construction* by requiring priority to be given to the certification provision, not the expiry date. If the expiry date of the letter of credit had been controlling, the beneficiary would have had no protection at all against nonperformance of the underlying contract: the letter of credit would have been an empty and meaningless promise, and the contracting parties' purpose in securing it would have been totally frustrated. As in *BA Commercial*, which involved a similar issue arising under a letter of guaranty, a literal application of the expiry date would have made a "proper demand [for payment] tech-

nically impossible and, therefore, contrary to the intent of the parties." 705 S.W. 2d at 716.

By giving priority to the certification provision rather than the expiry date, the *Kerr Construction* court also was applying two other well-established rules of contract construction under Texas law: (1) when contractual provisions appear to conflict, the first provision appearing in the document controls, *Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886); (2) a letter of credit must be construed against the issuer, *Temple-Eastex*, 672 S.W. 2d at 798; *Republic National Bank v. Northwest National Bank*, 578 S.W. 2d 109, 115 (Tex. 1978). Thus there is no reason to believe that the Texas Supreme Court would disagree with the holding of *Kerr Construction*.

3. Exxon originally brought this action in state court. As a result of the decision below, and the Fifth Circuit's failure to correct that decision in light of *Kerr Construction*, Exxon has been denied the benefit of the substantive law that would have governed its claim if the action had not been removed to federal court.

This is no trivial matter. The Fifth Circuit has deprived Exxon of a recovery in excess of $26 million, including interest, that was entirely valid under state law. This result strikes at the very heart of the *Erie* principle. To permit a defendant like Paribas to evade liability through the simple expedient of removing to federal court would be to "create discrimination against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949).

As *Huddleston* and *Braniff* demonstrate, the federal courts of appeals, when exercising diversity jurisdiction, must be alert to apply state decisions that are handed down after initial entry of judgment on appeal. To be

sure, at some point litigation must come to an end; a federal court's duty to reconsider its judgments in light of intervening state law can extend only so far. Thus, a state decision handed down, or brought to the federal court's attention, after denial of certiorari (or after the time for petitioning for certiorari has expired, if no petition is filed) arguably would come too late to trigger the obligation to follow state law. But that is not this case. Here, the intervening state decision was handed down prior to the Fifth Circuit's denial of rehearing and was called to the attention of the Fifth Circuit well in advance of the timely filing of this petition for certiorari, at a time when the case plainly remained "*sub judice*" as that phrase was used in *Huddleston* and *Braniff*.

Nor is this a case where the intervening state decision has only tangential or merely arguable relevance. The Texas court in *Kerr Construction* squarely held, in circumstances virtually identical to those here, that when the certification provision and expiry date of a letter of credit conflict, it is the certification provision and not the expiry date that controls. That holding is directly contrary to the Fifth Circuit's holding below. But even if there were an arguable basis for distinguishing the two cases, Exxon's assertion of a conflict between the two decisions is sufficiently plausible on its face to require explicit reconsideration by the federal court. *See Factors, Etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 11 (2d Cir. 1983). That is the minimum that *Erie* requires.

4. The Fifth Circuit predicated its denial of Exxon's motion for recall of mandate on the ground that the opinion in *Kerr Construction* bears the legend "Do not publish. Tex. R. App. P. 90(e)." App. E at 28a. *See* App. F. This was wrong for two reasons.

First, the very fact that the state appellate court chose not to publish its opinion confirms that *Kerr Construction* involved a noncontroversial application of settled principles of Texas law. The decision not to publish re-

flects the court's determination that the opinion is not one "that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." Tex. R. P. 90(e). It would make a mockery of the *Erie* principle if federal courts were permitted to disregard state appellate court decisions that go unpublished merely because they stand in the undisputed mainstream of state law.

Second, *Kerr Construction* itself remains *sub judice*, and the appellate court's opinion in that case may still be released for publication. At present, *Kerr Construction* is pending before the Texas Supreme Court on application for writ of error. "Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the [Texas] Supreme Court so orders." Tex. R. App. P. 90(h). In these circumstances, the Fifth Circuit at the very least should have stayed further proceedings in this case pending disposition of the application in *Kerr Construction*. Exxon should not be deprived of its right to recover $26 million under Texas law merely because the Fifth Circuit was too impatient to await a decision by the Texas Supreme Court that almost certainly will be controlling both on the merits and on the matter of publication.

In denying the motion for recall of mandate, the Fifth Circuit referred to Tex. R. App. P. 90(i), which bars the citation of unpublished opinions as authority. App. F. That rule would not have prevented an informed application of Texas law if this case had remained in state court. If the case had been decided agaist Exxon by a state appellate court rather than by the Fifth Circuit, Exxon could have moved to consolidate its case with

Kerr Construction in the Texas Supreme Court and have asked that Court to resolve the obvious conflict presented by the two cases.[3] The Texas Supreme Court then would have been able to correct the misapplication of Texas law in Exxon's case and extend to Exxon the benefits of the reasoning and holding in *Kerr Construction*. Under *Erie*, *Huddleston*, and *Braniff*, Exxon cannot be denied those benefits merely because Paribas removed this case to federal court.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Fifth Circuit vacated, and the case remanded with instructions either to reconsider in light of *Kerr Construction* or, alternatively, to stay further proceedings pending disposition of the application for writ of error in *Kerr Construction* and then to reconsider in light of that disposition.

Respectfully submitted,

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[3] A similar result could have been achieved here if the Fifth Circuit had acted upon Exxon's suggestion that the issue be certified to the Texas Supreme Court pursuant to Tex. R. App. P. 114(a).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 87-2007

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee Cross-Appellant,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant Cross-Appellee.

Oct. 8, 1987

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Standby letters of credit are issued by banks to assure the prompt payment of money to a party to another contract in the event that the other contract is not performed in accordance with its terms. The issuing bank is required to make payment only if it is presented with specified documents. The function of letters of credit requires that they be succinct and clear, for their utility lies in the assurance they provide that payment will be made on the specified terms without delay or litigation.

In this action for the wrongful dishonor of a letter of credit on which payment was demanded after the stated expiry date of the credit, we find that the obliga-

tion of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date. We therefore reverse the district court judgment holding the bank liable.

I.

In July 1981, Houston Oil & Refining, Inc. entered into a contract with Exxon Company, U.S.A., under which Exxon would deliver 558,000 barrels of crude oil to Houston in July and Houston would deliver an equal quantity of crude oil to Exxon "*during* September through December 1981. Exxon made this trade because it had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil. The contract required Houston to provide an irrevocable standby letter of credit to cover the value of the oil delivered by Exxon. It stated that the letter of credit was to be payable to Exxon "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more."

Houston then applied to Banque de Paris et des Pays-Bas, also known as Paribas, for a letter of credit in the amount of $19,530,000. In its application, Houston stated that the letter of credit was to be payable upon presentation of specified invoices; pipeline tickets or transfer statements; and a

> [s]tatement signed by an authorized representative certifying that Houston Oil & Refining, Inc. *has failed to deliver* to Exxon Company, U.S.A. 558,000 barrels of one of the following: South Louisiana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Grane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast *between September and December, 1981.*[1]

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[1] Emphasis added.

The application also expressly requested that the letter of credit expire on October 31, 1981.

Because the transaction was in effect an extension of credit to Houston, Paribas required Houston to provide security sufficient to cover the amount of the credit, and, as part of the security arrangement, the bank blocked certain funds coming into Houston's account. In addition, Paribas charged Houston a fee of $53,000 for establishing the credit.

On July 16, 1981, Paribas "opened" the credit by telex and delivered a copy of it to Exxon as requested by Houston. The credit stated that it was to be paid against the documents specified in the application, and that these documents "must be presented not later than October 31, 1981." Because October 31 would be a Saturday, the documents could also be presented on the next business day, Monday, November 2.[2] The credit also stated that it was subject to the 1974 revision of the Uniform Customs & Practice for Documentary Credits, a set of rules promulgated by the International Chamber of Commerce.[3]

Because the letter expired *on October 31*, yet covered deliveries *between September and December*, Paribas checked with Houston twice—both before and after issuing the letter—to make sure that the terms specified by Houston in its application were indeed what it had intended. Before the letter was issued, Flozella Telfair, the Paribas employee who dealt with the application, noted the apparent inconsistency and communicated with Houston. Upon receiving Houston's affirmation that the terms

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[2] Tex.Bus. & Com.Code Ann. § 3.503(c) (Vernon 1968); Uniform Customs & Practice for Documentary Credits art. 39, para. a, Int'l Chamber of Commerce Pub. No. 290 (1974 rev), *reprinted in* H. Harfield, *Letters of Credit* 135, 154 (1979).

[3] International Chamber of Commerce Pub. No. 290, *reprinted in* H. Harfield, *Letters of Credit* 135 (1979) [hereinafter cited as *Uniform Customs*].

were correct, Telfair drew circles on the application around both the October 31 expiration date and the September-December period specified for delivery, and next to these terms made the notation "OK as per HOR and R.P." (HOR was Houston, and R.P. was Rene Perdreaux, a Paribas lending officer responsible for the Houston account.) Subsequently, after the letter had been issued, Hal Peist, a letter of credit professional at Paribas, discussed its terms with Robert Wheelock at Houston and asked whether a change in the expiration date was desired. Wheelock responded negatively.

When the credit was opened, Paribas sent a copy of the letter to the attention of Don Meiers, the Exxon employee responsible for receiving and transmitting letters of credit and monitoring their expiration dates. Meiers received the letter of credit and transmitted it to the appropriate executives at Exxon with a letter stating that it "is due to expire October 31, 1981." Meiers' transmittal letter also noted that the credit covered the delivery of crude oil by Exxon during July and "the return" of the crude by Houston "between September and December 1981." No one at Exxon complained or even suggested that these terms were not fully satisfactory.

Exxon was an experienced trader of crude oil. It commonly balanced its crude oil supply by entering into exchanges and, unless it was dealing with a major oil company, secured those exchanges by receiving letters of credit issued in its favor. Exxon knew from its experience that it could insist on the amendment of unsatisfactory letters of credit, and it followed the practice of delaying the delivery of crude oil to its trading partners until it had actually received a satisfactory letter.

Houston made no delivery of crude oil to Exxon during September or October of 1981. Before October 31, Meiers brought the problem of Exxon's exposure to loss under the exchange contract to the attention of higher

management at Exxon. Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas. On October 30, Joe Imparato, the president of Houston and a former Exxon employee, said that he would extend the letter of credit on Monday, November 2; however, he did not do so. When Imparato visited Exxon during the week of November 2, he stated that Houston would not be able to return the crude oil under the contract, and asked whether Exxon would be willing to convert Houston's obligation into a long term debt. Exxon's representatives told Imparato that such an arrangement would be unsatisfactory, and that they would insist on performance as required by the contract.

During November, Paribas released both the security that it had held for its extension of credit to Houston and the funds that it had blocked in Houston's account. Subsequently, on November 30 and on December 1, Exxon attempted to obtain payment by presenting documents to Paribas. Paribas rejected both presentations as untimely.

II.

The district court found a "clash" between the expiry date in the letter and the dates specified for performance of the underlying contract. It held, however, that the letter of credit was not ambiguous because its meaning could be made certain "by application of the rules of [contract] construction." The court resolved the "inconsistency" in part by interpreting the letter of credit against its author, the bank—a rule of construction that generally applies only to clarify ambiguity[4]—and by reading the letter in such fashion as to make performance possible. The court thus construed the contract "in favor of Exxon" and, extending but not defining the

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[4] *See Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154, 156 (5th Cir. 1982); *Chevron Oil Co. v. E.D. Walton Const. Co.*, 517 F.2d 1119, 1122 (5th Cir. 1975).

expiry date, entered summary judgment in Exxon's favor.

III.

A letter of credit "means an engagement by a bank . . . made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." [5] The purpose of a standby letter is to insure that one or more parties to a contract will perform their duties under it.[6] The credit substitutes a known, accessible, and demonstrably impeccable source of funds in the event of default by the party whose performance it guarantees. Letters of credit facilitate commercial transactions, particularly in international commerce, by assuring certainty in application, consistency in interpretation across jurisdictional boundaries, and swiftness in execution. By eliminating credit risks, they reduce the cost of commercial transactions.

The transaction involves three separate contracts: The first one is the underlying commercial contract between two parties, one of whom will later apply to a bank for the letter, and the other of whom will be the beneficiary of the letter. The terms of this contract may not become known to the bank. The second contract is between the issuer of the letter of credit—typically a commercial bank—and its customer, who in applying for the letter asks the bank to draft the letter in conformance with specified terms. The third contract, the letter of credit itself, is between the issuer and the beneficiary.[7] The

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[5] Tex.Bus. & Com.Code Ann. § 5.103(a)(1) (Vernon 1968).

[6] *East Girard Sav. Ass'n v. Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598, 601 (5th Cir. 1979).

[7] *See East Girard Sav. Ass'n*, 593 F.2d at 601; *Sisalcords do Brazil, Ltd. v. Fiacao Brasileira de Sisal, S.A.*, 450 F.2d 419, 422 (5th Cir. 1971), *cert. denied*, 406 U.S. 919, 92 S.Ct. 1771, 32 L.Ed.2d 118 (1972); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 112 (Tex. 1978).

issuer unconditionally and irrevocably binds itself to pay a specified sum upon presentation of documents complying with the terms of the credit. The issuer's obligation to pay the beneficiary is generally independent of any obligation of the issuer's customer to the beneficiary,[8] and the issuer has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit.[9] An issuer who makes payment upon a presentation that does not conform to the requirements of the credit losses its right to repayment from its customers.[10]

A letter of credit is therefore strictly construed.[11] The issuer is required to act in good faith and to observe any general banking usage, but is not charged with responsibility for knowledge or lack of knowledge of any usage of the trade in which the customer and beneficiary are involved.[12] It must determine whether to make payment to the beneficiary "on the basis of the documents [presented to it] alone."[13]

A half century ago, when a particular letter of credit did not specify an expiration date, courts required that necessary documents be presented to the issuing bank "within a reasonable time."[14] Eventually, that formulation proved to be commercially unsatisfactory because it

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[8] J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 711-12 (2d ed. 1971).

[9] *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 464-65 (2d Cir. 1970); *see also Republic Nat'l Bank*, 578 S.W.2d at 114-15.

[10] *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230, 236 (5th Cir. 1983).

[11] H. Harfield, *supra*, at 36.

[12] Tex.Bus. & Com.Code Ann. § 5.109(a), (a)(3) (Vernon 1968).

[13] *Uniform Customs* art. 8, para. c.

[14] *See Lamborn v. Nat'l Park Bank*, 240 N.Y. 520, 148 N.E. 664, 666 (1925).

left a bank's obligation uncertain and open-ended. To solve this problem, the International Chamber of Commerce adopted the Uniform Customs & Practice for Documentary Credits. Article 37 of the *Uniform Customs* requires all letters of credit made subject to it to stipulate an expiry date. Paribas' letter of credit expressly incorporated by reference the *Uniform Customs*, and therefore by necessity stated a specific termination date.

The need for a precise expiration date is particularly acute when a standby letter of credit is issued. Although such a credit is different from a surety bond or a guaranty, it does assure payment in the event the account party fails to perform an underlying contract with the beneficiary, the terms of which may be unknown to the issuer. The standby credit is therefore an extension of a bank's credit to its customer and, for this reason, it is subject to the statutory and regulatory loan limits imposed upon lending institutions.[15] Because the issuer of a standby credit does not hold documents representing goods in a commercial transaction, it cannot look to those documents as security for repayment by its customer.[16] Therefore, the issuer must look solely to the financial strength of its customer and to whatever security it has required for issuance of the credit. The length of time that an issuer remains liable for a failure to perform by its customer is obviously a matter of critical importance to the issuing bank, to the customer who must pay for the credit, and to the regulatory authorities that monitor the bank's activities.[17] Good banking practice and common sense require that the bank's liability terminate at a date certain.

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[15] *Republic Nat'l Bank*, 578 S.W.2d at 114.

[16] *See Consolidated Aluminum Corp. v. Bank of Virginia*, 544 F.Supp. 386, 393-94 (D.Md. 1982), *aff'd*, 704 F.2d 136 (4th Cir. 1983).

[17] *See* J. Dolan, *The Law of Letters of Credit* ¶ 5.03[3][e] (1984).

IV.

The issue before us is not the clarification of a contract susceptible to more than one interpretation. The expiry date in the letter of credit is as certain as words permit. The requirement in the letter that Exxon certify, no later than October 31, 1981, that Houston "has failed to deliver . . . between September and December, 1981" created no uncertainty on the face of the letter as to its expiration date.[18]

Counsel for both sides have stated that the phrasing of the required certification, that Houston "*has failed* to deliver" the crude oil, excludes the possibility of presentation before the end of the stated delivery period. If that were indeed Exxon's understanding, then it should have refused the letter when tendered. The terms of the credit departed in more than one respect from the Exxon-Houston contract. As we have noted, that contract provided that the credit was to be payable "on presentation of invoices or [a] statement of an officer of Exxon certifying that invoices are unpaid and past due ten (10) days or more," and also provided that deliveries were to be made *during* September through December. Houston instead applied to Paribas for a letter of credit requiring a statement "by an authorized representative certifying that Houston . . . has failed to deliver . . . between September and December." If either these discrepancies or the expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston. Exxon's decision to deliver suggests the possibility that, as contended by counsel for Paribas, Exxon was relying at least in part on its business deal-

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[18] *Cf. Liberty Nat'l Bank & Trust Co. v. Bank of America Nat'l Trust & Sav. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955); *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex.Ct. App. 1986, no writ).

ings with Houston and its relationship with Imparato, a former crude oil trader at Exxon.

Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter. Indeed, the evidence shows that Exxon employees noted the expiry date upon their receipt of the letter of credit and that in late October Exxon asked Houston to obtain an extension of the expiry date.

Exxon does assert that Paribas did not act in "good faith" toward Exxon when it issued a letter of credit that its employees had questioned as "not mak[ing] sense" when Paribas knew that the letter was designed to secure Houston's contractual obligations to Exxon. No authority has been cited to us, and we have found none, that imposes on an issuer a duty to the beneficiary to "make sense" of the customer's application. As provided by Tex.Bus. & Com.Code Ann. § 5.109(a), Paribas did owe a duty of good faith to Houston, its customer. Tex. Bus. & Com.Code Ann. § 1.201(19) defines the standard of "good faith" as "honesty in fact in the conduct or transaction concerned." As mentioned earlier, Paribas checked with Houston both before and after issuing the letter to make sure that the terms specified in the application were what Houston intended. Thus, Paribas acted honestly toward Houston. Paribas' acceptance of Houston's assurances could not indicate dishonesty toward Exxon, for the expiration date was apparent on the letter when Paribas delivered it to Exxon. Paribas could tell Exxon no more than what was on the face of the letter, and Paribas knew that Exxon could insist on amendments to the letter if it was not saitsfied. Moreover, as already noted, Exxon has not alleged fraud against the bank or Houston. Paribas therefore complied entirely

with the terms of the letter when it interpreted the credit as having expired on November 2 and released its security to Houston.

As a lawyer experienced in letter of credit transactions has written, cautioning issuers, "the legality of a letter-of-credit transaction should not be equated with its prudence or commercial sense." [19] In like measure, the issuer is not charged with determining the utility to, or prudence of, a beneficiary who acts in reliance on its letter of credit. In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

We therefore hold that the letter of credit issued by Paribas required no construction and that it terminated on its express expiry date. The summary judgment is REVERSED and judgment is entered for Paribas.

GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.

I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil and Refinery, Inc. still had the months of November and December to return to Exxon the oil that they had received under the original contract between Houston Oil and Refining, Inc. and Exxon.

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[19] Harfield, *Code, Customs & Conscience in Letter-of-Credit Law*, 4 U.C.C.L.J. 7, 14 (1971).

I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct. I would affirm the granting of summary judgment to Exxon on the basis of his memorandum opinion of September 17, 1986, which is attached as Appendix A to this dissent.

[Appendix A to Judge Garza's dissent was the opinion of the district court, which is reprinted as Appendix B to this petition.]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-82-3481

EXXON COMPANY, U.S.A.,
Plaintiff,

VS.

BANQUE DE PARIS ET DES PAY-BAS,
Defendant.

MEMORANDUM

This action requires the construction of a letter of credit (letter) issued by the Banque de Paris et des Pay-Bas (Paribas) for the benefit of Exxon Company, U.S.A., (Exxon) to secure an obligation of Houston Oil and Refining, Inc. (HORI). The parties have filed cross-motions for summary judgment. The court will grant Exxon's motion and deny Paribas's motion.

On July 9, 1981, Exxon and HORI entered into an oil exchange agreement (agreement). Exxon, finding that it had a temporary surplus of crude oil at its Baton Rouge refinery, contracted to ship HORI approximately 558,000 barrels of crude in July 1981, and HORI agreed to deliver the same amount of crude to Exxon during September through December, 1981. The agreement required HORI to secure its obligation by a letter of credit in favor of Exxon for $19,530,000. On HORI's application, Paribas, for a fee of approximately $50,000, issued the letter on July 16, 1981.

Two provisions of the letter clash. The certification provision requires that in order to collect under the let-

ter, Exxon must certify that HORI failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. Exxon learned sometime in November that HORI was going to default. It presented the certification of HORI's default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely.

Exxon wants its money.

Making Sense of the Letter of Credit.

In the State of Texas letters of credit are subject to the same rules of construction that apply to ordinary contracts. *Temple-Eastex, Inc., v. Addison Bank*, 672 S.W.2d 793, 798 (Tex.1984); *Republic Nat'l Bank v. Northwest Nat'l Bank*, 578 S.W.2d 109, 115 (Tex.1978). The question of ambiguity in a contract is one of law. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex.1983); *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W. 2d 517, 518 (Tex.1980). A contract is ambiguous only where its meaning remains uncertain after application of the rules of construction. The letter is not ambiguous.

Against the Drafter.

Inconsistencies must be resolved against the party who drew the contract. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. This rule seems especially compelling here. Deposition testimony shows that shortly after the letter was issued a Paribas employee noticed the inconsistency and discussed it with HORI. Paribas never sought to amend the letter to remove the contradiction or to notify Exxon.

Possibility of Performance.

A construction in favor of Exxon is required by the rule that contracts must be construed to render perform-

ance possible. *Temple-Eastex, Inc.*, 672 S.W.2d at 798; *Republic Nat'l Bank*, 578 S.W.2d at 115. Obviously Exxon could not have certified on October 31 that HORI had not delivered through the end of the following two months. Paribas argues that practices in the industry were such that in the normal course of things Exxon should have known by October 31 that HORI would default. Assuming that to be the case, it does not follow that Exxon was bound to make presentment by October 31. The presentment provision required Exxon to certify that HORI had defaulted, not that it probably would. It is difficult to believe that Paribas would have cheerfully paid $19,000,000 to Exxon for a default that had not yet taken place.

BA Commercial Corp. v. Hynutek, Inc., 705 S.W.2d 713 (Tex.App.—Dallas 1986, no writ), supports Exxon's position. In that case the court construed a letter of guaranty that required Hynutek to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynutek made demand upon the guarantor at the end of January.

Ignoring the dictum about the letters of credit generally, the court in *BA Commercial* identified and applied the rules of construction that resolve this case.

> [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
>
> * * * *
>
> [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.

BA Commercial, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

Exxon Could Have Lied.

Paribas, becoming disingenuous, maintains that there was nothing to stop Exxon from certifying by October 31 that HORI had defaulted, although a default had not occurred until mid-November. Paribas purports to have understood the certification simply as "a statement . . . allowing Exxon to recover the proceeds of the letter of credit at any time during the specified period that it believed itself to be at risk in the transaction." (Paribas's January 1986 memorandum of law, p. 15). The court rejects this interpretation of certification for three reasons. First, it strains the court's credulity to believe that Paribas would or should have paid on Exxon's representation that it was merely feeling insecure about HORI's future performance. HORI would have sued Paribas. Second, it is difficult to understand the reason for the requirement of certification if something less than an actual default were enough to trigger payment. One certifies the truth of specific, verifiable facts, not one's fears as to future performance. Had Paribas received a certification from Exxon of an unequivocal announcement of impending default by HORI, Paribas might have accepted it as an anticipatory breach or repudiation, but the facts do not give rise to that argument. Third and most important, where the plain wording of a letter of credit requires a party to certify the past occurrence of specific events, it is inimical to maintain that the actual truth of the certification is of no importance.

Election of Remedies.

Paribas also argues that Exxon cannot recover because Exxon has made an election of remedies. The basis of this claim is that, after failing to obtain payment from Paribas, Exxon in January 1982 entered into an agreement with HORI (1982 agreement). The purpose of this agreement was to rescue HORI's indebtedness to Exxon, both under the agreement that the letter was issued to cover and under another oil exchange agreement on which

HORI had defaulted. In October 1982 HORI defaulted on the 1982 agreement. Exxon filed suit against it, and Paribas argues that in so doing Exxon foreclosed its option to sue Paribas. The court does not agree.

Election of remedies is defined in Texas as "the act of choosing between two or more inconsistent but co-existent modes of procedure and relief allowed by law on the same set of facts." *Custom Leasing, Inc. v. Texas Bank & Trust*, 491 S.W.2d 869, 871 (Tex.1973). The classic example of election of remedies involves a plaintiff's choice between two remedies that may be imposed on the same defendant, as between specific performance and damages in a contract case, or between negligence and intentional injury in a tort action. *Seegers v. Spradley*, 522 S.W.2d 951 (Tex.Civ.App.—Beaumont 1975), writ ref'd n.r.e.); *Fulmer v. Rider*, 635 S.W.2d 875 (Tex. App.—Tyler 1982, writ ref'd n.r.e.). Here, by contrast, Exxon is proceeding under what are really two distinct contracts with two distinct obligors: the letter and the 1982 agreement with HORI.

Accord or Novation.

Similar to the election claim, Paribas argues that the 1982 agreement constituted either an accord and satisfaction or a novation. Neither claim is tenable. There is no indication that there was an agreement express or implied, between Exxon and HORI that Paribas would be released from its responsibility. That intention to release Paribas must have been embodied in their agreement for an accord and satisfaction to exist to Paribas's benefit. *E.g., San Benito Bank & Trust Co. v. Rio Grande Music Co.*, 686 S.W.2d 635, 640 (Tex.App.—Corpus Christi 1984, writ ref'd n.r.e.). There is also no novation between Paribas and Exxon since Paribas and Exxon did not reach any agreement. *See Dodson v. Sizenbach*, 663 S.W.2d 13, 16 (Tex.App.—Houston [14th Dist.] 1983, no writ); *Villarreal v. Laredo Nat'l Bank*, 677

S.W.2d 600, 607 (Tex.App.—San Antonio 1984, writ ref'd n.r.e.).

If HORI had performed the 1982 agreement and if Paribas had then paid Exxon, HORI may have been entitled to recover the payment from Exxon. That did not happen.

Conclusion

A judgment will be entered in favor of Exxon for $19,530,000, pre-judgment interest at 6% from January 1, 1982, post-judgment interest, and costs of court, leaving attorneys' fees the only issue to be decided.

Signed on September 17, 1986, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN N. HUGHES
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

D.C. Docket No. CA-H-82-3481

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Texas

Before RUBIN, GARZA, and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

October 8, 1987

JONES, Circuit Judge, dissenting.

Issued as Mandate: Dec. 18, 1987

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10-08-87, 5 Cir., 198–, —— F.2d ——)
(December 8, 1987)

Before RUBIN, GARZA and JOLLY, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

No. 07-86-0205-CV

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO
PANEL A

NOVEMBER 17, 1987

KERR CONSTRUCTION COMPANY and the
CITY OF LUBBOCK,
Appellants

v.

THE PLAINS NATIONAL BANK OF LUBBOCK,
Appellee

From the District Court of Lubbock County;
72nd Judicial District No. 85-509,842-A;
HONORABLE DENZIL BEVERS, JUDGE

Before REYNOLDS, C.J., and DODSON and BOYD, JJ.

Kerr Construction Company and the City of Lubbock appeal from the trial court summary judgment on Kerr and the City's action to recover on a letter of credit issued by the Plains National Bank of Lubbock. By their first point of error, Kerr and the City claim the trial court erred by granting the Bank's motion for summary judgment and by denying their motion for summary judgment. We agree, reverse the trial court's judgment, render judgment for Kerr and the City, sever Kerr and

the City's action for attorney's fees, and remand that action to the trial court for a determination of the amount of attorney's fees.

The record shows that on 15 September 1984, Kerr contracted with Cary L. Johnson to "pave" the subdivision Johnson was developing. In consideration for $63,768.13, the contract required Kerr to furnish all labor and materials for paving, curbs, gutters, alley returns, and drainage. One of the conditions of the paving contract required Johnson to secure the obligation of payment by the issuance of a letter of credit to the City. Johnson complied with the requirement of the contract by securing the issuance of a letter of credit by the Bank two days later, on 17 September 1984.

The letter of credit prepared and issued by the Bank reads:

PLAINS
NATIONAL BANK OF LUBBOCK
50th St. at University Ave./Box 271
Lubbock, TX 79408/(806) 795-7131

Irrevocable Letter of Credit No. *485*

The Meadows Addition, Lots 1346-1433
September 17, 1984

Honorable Mayor and City Council
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

Dear Sir:

We hereby authorize you to draw on us for the account of Mr. Cary L. Johnson up to an aggregate amount of U.S. $63,768.13 available by your draft at sight when accompanied by your signed statement that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete the paving improvements required in conjunc-

tion with the platting of The Meadows Addition, Lots 1346-1433.

It is a condition of this letter of credit that it shall be extended without amendment for an additional period of six (6) months from the expiration date hereof unless thirty (30) days prior to such expiration date we shall notify you, Attention: The Property Development Coordinator, in writing by registered mail at the above address that we elect not to renew this letter of credit for such additional period.

In the event we elect not to renew this letter of credit, this letter of credit will be payable against your signed statement that Cary L. Johnson is still obligated under the City of Lubbock Code Section 25-6-B (6) to provide a cash deposit and has failed either (1) to replace this letter of credit with another letter of credit within fifteen days from the expiration date of this credit, or (2) to provide a cash deposit to the City of Lubbock in accordance with the City of Lubbock Code Section 25-6-B (6).

Your drafts must bear the clause "DRAWN UNDER THE PLAINS NATIONAL BANK OF LUBBOCK AT LUBBOCK, LETTER OF CREDIT NO. 485."

We hereby engage with you that your draft(s) under and in compliance with the terms of this letter of credit will be duly honored if presented to us on or before January 1, 1985 together with the document(s) specified herein.

Sincerely yours,

/s/ Jim R. Shearer
JIM R. SHEARER
Senior Vice President
The Plains National Bank
of Lubbock
Lubbock, Texas

(emphasis added)

Kerr performed the paving contract to the extent of $50,174.75, but Johnson failed to pay Kerr. Kerr accordingly ceased work with the balance of the contract remaining unperformed, representing some $13,593.38 of the contract amount. The contract remained uncompleted on 17 July 1985, ten months after the date of the letter.

On that ten-month anniversary, 17 July 1985, the City drafted on the Bank to pay $63,768.13. The Bank denied any liability on the basis that the letter of credit expired by its terms on 1 July 1985. The Bank asserted that 1 January 1985 represented the initial due date which was automatically extended until 1 July 1985, because the Bank never gave the notice that prevented the automatic extension for an additional six months.

Kerr and the City accordingly sued to collect on the letter of credit. Kerr sought its unpaid amount of $50,174.75, and the City sought the total amount of the letter, $63,678.13 (the City, however, recognizing that Kerr is entitled to $50,174.75 of the total amount with the City being entitled to the balance). Both Kerr and the City also requested prejudgment and post-judgment interest and attorney's fees. Since the district court granted summary judgment for the Bank it had no occasion to award any interest or find an amount for attorney's fees.

This case raises the single issue of the due date of the letter of credit. That issue is resolved by our construction of the document. The Bank sought and obtained summary judgment on the ground that the letter of credit expired on 1 July 1985. On the other hand, Kerr and the City sought and were refused summary judgment on the basis that the letter of credit, properly construed, was never due, as a matter of law, until 17 July 1985, ten months after its issue.

It is well settled that the rules of construction for ordinary contracts govern letters of credit. Temple-

Eastex Inc. v. Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984). It is equally well settled that where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. Benskin v. Barksdale, 246 S.W. 360, 363 (Tex. Comm'n App. 1923, judgm't adopted). In this instance, it is undisputed that the first provision (the first paragraph) of the instrument is in direct and irreconcilable conflict with the last provision (the last paragraph) of the instrument.

The first numbered paragraph provides: "We hereby authorize you to draw on us for the account of Mr. Cary L. Johnson up to an aggregate amount of U.S. $63,768.13 available by your draft at sight when accompanied by your signed statement *that the contractor Kerr Construction Company has defaulted or failed within ten (10) months to complete the paving improvements required* in conjunction with the platting of The Meadows Addition, Lots 1346-1433" (emphasis added). That paragraph states the condition precedent to the Bank's liability and, as such, is the most significant and essential provision in the agreement. In the absence of a default or failure by Kerr Construction Company to complete the paving improvements within ten months from 17 September 1984, there is no liability on the Bank.

It is well settled then when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration. Osburn v. Smart, 58 S.W.2d 1073, 1078 (Tex.Civ.App.—Fort Worth 1932, writ dism'd) (opinion on motion for rehearing). In *Osburn*, the court also acknowledged and applied the rule that where there is an irreconcilable conflict between

clauses or provisions in the contract, the expression in the clause or provision first appearing will control. In this instance, we conclude that the time stated in the first unnumbered paragraph prevails over the time stated in the last unnumbered paragraph.

The Bank points out that the usual letter of credit transaction is comprised of three separate contracts. The first contract is between the parties (Kerr and Johnson) to the underlying obligation. The second agreement is by and between the Bank and its customer (Johnson). The third agreement is the letter of credit which is between the Bank and the beneficiary (the City). In that regard and relying on Westwind Exploration v. Homesite Sav. Ass'n, 696 S.W.2d 378 (Tex. 1985), and Summitt Ins. Co. v. Central Nat. Bank of Houston, 624 S.W.2d 222 (Tex.Civ.App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.), the Bank contends that the first paragraph is merely a general reference to the underlying agreement between Kerr and Johnson and that reference to the underlying agreement in letters of credit is considered surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of the letter of credit.

In Summit Ins. Co. v. Central Nat. Bank of Houston, 624 S.W.2d at 225, the court stated, "General references to underlying agreements are surplusage and should not be considered in deciding whether the beneficiary has complied with the terms of the credit." However, immediately preceding that statement, the court stated, "The beneficiary's non-compliance with the underlying contract does not affect the issuer's liability *unless a reference to the underlying contract explicitly creates a condition for honoring a draft*" (emphasis added). *Id.* In this instance, as we stated above under the first paragraph, the Bank's liability on the letter of credit is expressly conditioned on Kerr's default or failure to com-

plete the paving improvements within ten months. The Bank's general reference contention is overruled.

The Bank further contends that the trial court properly rendered summary judgment for the Bank because Kerr is not a beneficiary of the letter of credit. Under that contention, the Bank argues that its "liability on the Letter of Credit is limited to the cost of completing the improvements undertaken and such liability only extends to the beneficiary." The letter of credit does not state that the Bank's liability is limited to the cost of completion. By the expressed provision in the letter of credit, the Bank's liability is stated as "up to an aggregate amount of U.S. $63,768.13."

The fact that the Bank issued the letter of credit to the City as the primary beneficiary does not alter or relieve the Bank from its full obligation ($63,768.13) under the letter of credit. An implicit purpose of the letter of credit was assurance to the City and Kerr that the paving improvements would be completed and paid for at the stated price. In that regard, it is undisputed that the stated price of the improvements was $63,768.13. Likewise, the Bank's obligation under the letter of credit is in the same amount. Also, it is undisputed that Kerr completed $50,174.75 of the paving improvements and that $13,593.38 of the paving improvements remained uncompleted. Consequently, for the reasons stated, we conclude that the trial court erred by granting the Bank's motion for summary judgment and by denying Kerr and the City's motion for summary judgment.

In summary, Kerr and the City's first point of error is sustained. Accordingly, we reverse the trial court's judgment and render judgment that Kerr Construction Company do have and recover of and from Plains National Bank of Lubbock the amount of $50,174.75, plus prejudgment interest at the rate of ten (10%) percent per annum from 17 July 1985 to 23 June 1986, com-

pounded daily, as prescribed by article 5069-1.05, section 2 of the Texas Revised Civil Statutes Annotated (Vernon 1987) and 11 Texas Register 2396, plus post-judgment interest at the rate of ten (10%) percent per annum from 24 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, until the judgment is fully paid; and, that the City of Lubbock do have and recover of and from Plains National Bank of Lubbock the amount of $13,593.38, plus prejudgment interest at the rate of ten (10%) percent per annum from 17 July 1985 to 23 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, plus post-judgment interest at the rate of ten (10%) percent per annum from 24 June 1986, compounded daily, as prescribed by article 5069-1.05, section 2 and 11 Texas Register 2396, until the judgment is fully paid. Also, Kerr and the City's claim for attorney's fees is severed from this action and remanded to the trial court for further determination.

All costs are taxed against Plains National Bank of Lubbock.

CARLTON B. DODSON
Justice

Do not publish. Tex. R. App. P. 90(e).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED, because, inter alia, Rule 90(i) of the Texas Rules of Appellate Procedure states:

> Unpublished opinions shall not be cited as authority by counsel or by the court.

/s/ [Illegible]
United States Circuit Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2007

EXXON CORPORATION, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Plaintiff-Appellee
Cross-Appellant,

versus

BANQUE DE PARIS ET DES PAYS-BAS,
Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

[Filed Feb. 12, 1988]

ORDER:

The motion of Appellee, Exxon Corporation, for leave to file a second suggestion for rehearing en banc is DENIED.

/s/ [Illegible]
United States Circuit Judge

APPENDIX H

EXXON CORPORATION

Affiliates and Subsidiaries—Not Wholly-Owned*

Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdol GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.

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* Does not include companies with less than 5% Exxon Ownership.

BRIGITTA Erdgas und Erdol GmbH, Hannover
Bryan Woodbine Gathering Inc.
Byron Creek Collieries (1983) Limited
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte, Ltd.
Chuo Sekiyu Hanbai K.K.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliarie du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Flussigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdol GmbH, Hannover
Elwerath Erdol und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.

Emsland-Erdolleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdol und Erdgas GmbH
Gewerkschaft Elwerath & Co. GmbH
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdol GmbH

Gewerkschaft Kuchenberg Erdgas und Erdol GmbH
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Home Energy Company Ltd.
Home Oil Company Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengeselischaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industry Promotion Enterprises Limited
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General

K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzernisches Erdol
Les Docks des Petroles d'Ambes
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.

Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S.A.
Marugo Gas K.K.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
Mr. Lube Canada Inc.
Mytex Polymers Incorporated
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
N. V. Nederlandse Gasunie
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited

Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Nordrheinische Erdgas Transport Gesellschaft
mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.
Northwest Company, Limited
Nottingham Gas Limited
107580 Canada Inc.
139675 Canada Limited
151742 Canada Inc.
158437 Canada Ltd.
158883 Canada Inc.
159129 Canada Inc.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K.K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Raffinerie du Midi S.A.R.L.

Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft
S.A. du Pipeline a Produits Petroliers sur
Territoire Genevois (SAPPRO)
S.A.R.L. Viain
SEAG Aktiengesellschaft fur schweizerisches Erdol
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizucka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii
Minerali-SARPOM

Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar"—PROLUMA S.A.
Societe Belge de Transport par Pipeline
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dukar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Developement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe de Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geominest-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne

Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company
(Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavers
Suddeutsche Erdgas Transport Gesellschaft
mit beschrankter Haftung
Sulbath Exploration Ltd.
Sun East Company Ltd
Supertex, Inc.
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Industries Limited
System Plaza Kabushiki Kaisha
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
THUMS Long Beach Company

Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonenu Technology K. K.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdautsche Erdolleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

No. 87-1467

Supreme Court, U.S.
FILED
APR 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Petitioner,

—against—

BANQUE DE PARIS ET DES PAYS-BAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the United States Court of Appeals for the Fifth Circuit properly deny a second request for rehearing which was premised solely on an unpublished decision by a Texas intermediate appellate court having no precedential value in the Texas state courts?

RULE 28.1 STATEMENT

The parent, principal affiliates and non-wholly-owned subsidiaries of respondent are listed in Appendix 1.

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Rules and Statutes

Rule 90(i), Texas Rules of Appellate Procedure ..... *passim*

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Treatise

1A J. Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.307, at 3097 (2d ed. 1987) 3-4

RULE INVOLVED

This petition for certiorari involves Rule 90 of the Texas Rules of Appellate Procedure, subsection (i) of which reads as follows:

> **Unpublished Opinions.** Unpublished opinions shall not be cited as authority by counsel or by a court.

The full text of Rule 90 is reprinted in Appendix 2.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Petitioner,

—against—

BANQUE DE PARIS ET DES PAYS-BAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

CERTIORARI SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT ACTED PROPERLY IN REFUSING REHEARING ON THE BASIS OF AN OPINION WHICH IS WITHOUT PRECEDENTIAL VALUE

This case concerns the non-payment by respondent ("Paribas") of a letter of credit first presented to it for payment a month after its stated expiry date. The Fifth Circuit, relying in substantial part on well-settled principles of Texas law,[1] held

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1 In addition to various sections of the Texas Business and Commercial Code, the Fifth Circuit relied on *Republic Nat'l Bank* v. *Northwest*

that payment was not required, even though petitioner ("Exxon") might not have been able to present the documents called for by the letter of credit before the expiry date. After judgment was rendered below, Exxon filed with the Fifth Circuit a suggestion for en banc consideration. On December 8, 1987, the Fifth Circuit denied that application and, treating it as a petition for a panel rehearing, denied that application also. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir.), *reh'g en banc denied*, 835 F.2d 1433 (1987).

In January 1988, Exxon discovered an unpublished opinion which had been issued by a Texas court of appeals, an intermediate level appellate court, on November 17, 1987. The opinion bore the notation "Do not publish. Tex. R. App. P. 90(e)." *See* Exxon's Petition for a Writ of Certiorari ("Pet."), App. D at 28a.[2] Exxon brought the unpublished opinion to the attention of the Fifth Circuit in the form of a motion to recall the Fifth Circuit's mandate and a motion for leave to file a second suggestion for en banc consideration. The Fifth Circuit denied both motions on February 12, 1988.[3]

Nat'l Bank, 578 S.W.2d 109 (Tex. 1978); *B.A. Commercial Corp.* v. *Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.—Dallas [5th Dist.] 1986, no writ), and the following federal decisions, all of which also applied Texas law: *Richland Plantation Co.* v. *Justiss-Mears Oil Co.*, 671 F.2d 154 (5th Cir. 1982); *East Girard Sav. Ass'n* v. *Citizens Nat'l Bank & Trust Co.*, 593 F.2d 598 (5th Cir. 1979); and *Chevron Oil Co.* v. *E.D. Walton Constr. Co.*, 517 F.2d 1119 (5th Cir. 1975). None of these authorities was questioned or modified by the unpublished decision now relied on by Exxon.

2 The Texas court of appeals re-affirmed its decision not to publish its opinion when, on January 27, 1988, it denied a motion by one of the parties in that case to publish the opinion. *See* Appendix 3.

3 Thereafter, on the same day that Exxon filed its petition for certiorari, Exxon filed in the Texas Supreme Court (as an "amicus curiae") a motion seeking publication of the court of appeals' opinion, as well as a brief in connection with the application for a writ of error. In its motion to publish, which is still pending, Exxon misstates the facts of

Exxon now seeks a writ of certiorari based solely upon that unpublished decision. Under Texas law, however, the "do not publish" opinion is of no precedential value and is not to be cited as authority either by counsel or the court. Rule 90(i), Texas Rules of Appellate Procedure, App. 2 at A-8; *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983).

In *Berry*, the Supreme Court of Texas declared that an "unpublished . . . opinion is of no precedential value and should not be cited." 647 S.W.2d at 947. As a Texas court of appeals has said: "An unpublished opinion of this Court or any other court has no authoritative value." *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston [1st Dist.] 1986). That Exxon has chosen deliberately to rely on a case devoid of precedential value and, in the process, to violate the Texas Rules of Appellate Procedure both in the Fifth Circuit and in this Court should not give Exxon greater rights than it would have if it complied with the requirements of Texas law.

The Rules of Decision Act directs federal courts to regard as the rules of decision the substantive laws of the appropriate state except where the Constitution or treaties of the United States or Acts of Congress provide otherwise. 28 U.S.C. § 1652 (1982). A federal court exercising diversity jurisdiction must therefore follow and apply state law as it would be applied by the state courts. *Erie R. R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938). In determining state law, however, "a federal tribunal should be careful to avoid the 'danger' of giving 'a state court decision a more binding effect than would a court of that state under similar circumstances.' " *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662 (3d Cir.) (quoting 1A J.

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this case when it says "The Fifth Circuit denied Exxon's motions *solely* because the decision of the Amarillo Court of Appeals in this case is unpublished." (Emphasis Exxon's). Of course, the Fifth Circuit's order denying Exxon's motion to recall the mandate makes clear, by the use of the phrase "inter alia", that the Fifth Circuit had one or more additional reasons for denying the motion. *See* Pet., App. F at 29a.

Moore, W. Taggart, A. Vestal & J. Wicker, *Moore's Federal Practice* ¶ 0.307, at 3097 (2d ed. 1987)), *cert. denied*, 449 U.S. 976 (1980).

Giving credence to unpublished opinions when the state courts would not is just such a danger. *King* v. *Order of Travelers*, 333 U.S. 153 (1948); *Southern Ry. Co.* v. *Foote Mineral Co.*, 384 F.2d 224 (6th Cir. 1967). In *King*, this Court approved the Fourth Circuit's refusal to follow an unpublished decision of the South Carolina Court of Common Pleas. Even though South Carolina did not have a rule comparable to Rule 90(i) of the Texas Rules of Appellate Procedure, this Court held unanimously that the federal courts were not required to follow the unpublished South Carolina decision because of the inability of the bench and bar generally to have access to such unpublished opinions and because the South Carolina courts themselves afforded little precedential weight to such decisions. As stated by Chief Justice Vinson:

> [A]s we have but recently had occasion to remark, a federal court adjudicating a matter of state law in a diversity suit is, "in effect, only another court of the State" [citing *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 108 (1945)]; it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court.

King, 333 U.S. at 161. In *Southern Ry.*, the Sixth Circuit concluded, on the basis of *King*, that it was not required to follow an unpublished decision by even the state's highest court (*i.e.*, the Tennessee Supreme Court) because such a decision would not be considered binding precedent in that state.

Unpublished opinions of Texas courts are simply not part of the jurisprudence of Texas which the federal courts are required to follow. When the Fifth Circuit denied Exxon's motion to recall the mandate because of, *inter alia*, Rule 90(i) of the Texas Rules of Appellate Procedure, the Fifth Circuit fully complied with the requirements of *Erie*, in that it gave the unpublished opinion exactly the same dignity and weight as it would have been accorded in a Texas state court—none whatsoever.

CONCLUSION

The fact that the Fifth Circuit did exactly what Texas law called upon it to do is not an appropriate basis for the invocation of the supervisory jurisdiction of this Court. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX 1

Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of BANQUE PARIBAS (formerly called Banque de Paris et des Pays-Bas)

Parent:

Compagnie Financiere de Paribas

Principal Affiliates and Subsidiaries Not Wholly-Owned*:

Aqualand
Avenir Electronique "AVELEC"
Avenir Participations "AVEPAR"

Banco Amazonas
Banque Continentale du Luxembourg
Banque de Bienne
Banque Franco-Yougoslave
Banque Ottomane
Banque Paribas
Banque Paribas (Belgique) S.A.
Banque Paribas Cameroun
Banque Paribas Capital Markets, Ltd.
Banque Paribas Cote d'Ivoire
Banque Paribas Deutschland OHG
Banque Paribas du Canada
Banque Paribas Gabon
Banque Paribas Luxembourg S.A.
Banque Paribas Norge
Banque Paribas N.V.
Banque Paribas Pacifique
Banque Paribas Polynesie
Banque Paribas (Suisse) S.A.
Banque Paribas Sverige
Banque Parisienne et Internationale

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* Excludes companies in which the interest of Compagnie Financiere de Paribas is less than 5% or $1 million.

Banque Petrofigaz
Banque Pouyanne
Banque Sudameris
Bridel Emile
Bureau d'Etudes et de Transactions Immobilieres
Caisse Centrale de Reescompte
Campenon Bernard
Carbone Lorraine
Cellulose du Rhone et d'Aquitaine
C.G.I.B. Banque pour la Reconstruction et l'Equipement
Chiers Chatillon
Cie Holding pour l'Aluminium
"Cimopar" Compaganie d'Investissements Moboliers de Paribas
C.K.S. France
CN Industries
"COBEPA"

Main subsidiaries of COBEPA include the following companies:

Groupe I
Compagnie de Participation Internationale
Compagnie de Participation Internationale (Nouvelle) N.A.
CDI
Compagnie Generale Mosane
Societe Financiere de Developpement et de Participations
Libelux S.A.
Agemar S.A.
Investerings en Beleggings Maatschappij Lacourt
Vlaamse Investerings en Beleggings-Maatschappij
Financial Control International
Groupe Financier Liegois
Regio
Cosylva
Cofim
Sogespar

Courcelles Nord
Sodemeuse
Paribas Realty
Paribas Participations Limitee
Sodepa

Cofimer
Coginvest
Cometra Grands Lacs
Compagnie Arabe de Financement International
Compagnie Auxiliaire d'Enterprises et de Chemins de Fer
Compagnie Bancaire

Main subsidiaries of the Compagnie Bancaire group include the following companies:

Union de Credit pour le Batiment
Compagnie pour la Location d'Equipements Professionnels
Union Francaise des Banques "UFB"
Fonciere de la Compagnie Bancaire
Credit a l'Equipement des Menages
Locabail Immobilier
Compagnie Francaise d'Epargne et de Credit
Societe d'Investissements Immobiliers de France
Societe d'Investissements Immobiliers de France Contructions
Compagnie pour le Financement de l'Industrie du Commerce & de l'Agriculture
SICAR
Locabail Energie
Kleber Portefeuille
Cardimo
Sofarim Habitation
Locabail Finance International Ltd.
Compagnie Financiere Kleber
Cardif
Cofibail Auto

Compagnie Bancaire USA Finance Corp.
Compagnie Centrale de Financement

Compagnie de Fives-Lille
Compagnie d'Entreprises Industrielles et Commerciales
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres
Compagnie Financiere de Syrie et du Liban
Compagnie Fonciere
Compagnie Franco-Marocaine
Compagnie Generale de Developpement Immobilier
Compagnie Holding pour l'Aluminium
Compagnie Metallurgique et Miniere
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Espanola
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Minera
Compagnie de Participations, de Recherches et d'Exploitation Petrolieres Norge
Compagnie Luxembourgeoise de Television "CLT"
Conseil Investissement
Corexcal Inc.
Corexland
Credit du Nord
Credit du Nord Belge
Credit Naval

Dolisos
Doux Ets
Droust Assurances

Enelfi Bretagne
Erbe S.A.
Eurafrep
Eural Spaarkas N.V.
Eurocem, Inc.

Financiere du Caz et de l'Energie
Financiere Gabonaise de Developpement Immobiler
Fougerolle

Gevaert
Groupe Bruxelles-Lambert
Groupe Credit du Nord

Main subsidiaries of the Credit du Nord group include the following companies:

Banque Nuger Pierre
Banque Nicolet, Lafanechere et de L'Isere
Union Bancaire du Nord
Banque Tarneaud Freres et Cie
Banque Joire Pajot et Martin
Caisse Generale de Depots et d'Avances
Societe Immobiliere et Financiere d'Investissements et de Coordination
Banque Lenoir et Bernard
Banque Arnaud Gaidan
Sedel
Norbail
Banque de Marches et d'Arbitrage

Historische Gebouwen
HRI Dolisos America

IHC Caland N.V. (and subsidiaries)
Immobiliere Rosiers
Immo-Paribas S.A.
Imosa
Intec Systems, Inc.
Interven
Itag

Knoedler-Modarco

Lectra Systeme
Logibail

Maneurop
Mestrezat
Multireal S.A.

Nantes Navires Participations
Neficom
Nigeria Merchant Banking Corporation
Nord-Est
Nouvelle Compagnie Financiere pour l'Outre-Mer
Novolease S.A.

OCEFI
"ODGH" Omnium de Developpement et de Gestion Holding
Omnium de Participations Bancaires Paribas "OPB-Paribas"
Omnium de Participations Financieres et
Industrielles de Paribas "Opfi-Paribas"
Onatra S.A.
Opafi
OTH

Pargelux
Paribas Asia Holding
Paribas Asia (1985) Ltd.
Paribas Bank International (Texas) Inc.
Paribas do Brazil
Paribas Europe
Paribas Finance, Inc.
Paribas Finance (Texas), Inc.
Paribas Finanziara Spa
Paribas Group Australia Pty, Ltd.
Paribas International
Paribas Investment Australia
Paribas North America, Inc.

Main subsidiaries of Paribas North America, Inc. include the following companies:

Paribas Corporation
Paribas Technology, Inc.
Paribas Asset Management Incorporated
Paribas Asset Management S.A.
Paribas International Bond Management
Paribas Futures
Paribas Properties

Paribas Participations B.V.
Paribas Securities (Panama) Inc. c/o Arias Fabrega
Paribas South East Asia Ltd.
Paribas Suisse (Bahamas) Limited
Paribas Trust Co.
Paribas U.K. Holding Limited
Paribaven

Poliet
Polydev
Prominco Holding

Quilter Goodison

Regie Immobiliere de la Ville de Paris
Robert Lefevre S.A.
Roegiers

SACI
SAGIP
S.A.I.C. Velcorex
Sait Electronics
Samaf
Saulnes-Chatillon
Scoa
Sedicecom
Segin Nord (Lille)
Sema-Metra
SFEEC
Smurfit Paribas Bank Ltd.
SNBE (Societe Nouvelle de Banque Europe)
Societe Anonyme de Gestion et d'Investissements et de Participations
Societe Anonyme de Transactions Internationales
Societe Auxiliaire de la Construction Immobiliere
Societe de Gestion d'Interets Petroliers
Societe de Participations Camerounaise
Societe de Participations Fincaires et Financieres Paribas "SPB-Paribas"
Societe de Participations Ivoirienne
Societe de Participations Techniques et Financiere
Societe de Recherche et de Financement
Societe des Ciments Francais
Societe d'Etudes Immobilieres et de Constructions
Societe d'Organisation, de Management et de Developpement pour les Industries Alimentaires et Agricoles
Societe Francaise de Sucreries au Chili
Societe Gabonaise de Participations

Societe Generale Commerciale et Financiere
Societe Generale de Financement Intercontinental
Societe Immobiliere Victoire
Societe Metallurgique de Gorcy
Societe Neo-Caledonienne de Developpement et de Participations
Societe Nouvellas Paribas International "SNPI"
Sococal
SOFIREAL
SOGEDIP
Ste Marocaine de Depots et de Credit
Sud Pacifique Miniere

Texaf Financiere Gestion
Transnucleaire

UFIBA
UGC Belgique
Union Financiere et Bancaire

Valeo
Valeurs et Rendements (Luxembourg)
Valex Petroleum, Inc.
Veninter
Vinton Oil and Gas Company

APPENDIX 2

Rule 90 of the Texas Rules of Appellate Procedure provides:

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished

to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or by a court.

APPENDIX 3

[SEAL OF STATE OF TEXAS]

COURT OF APPEALS
Seventh District of Texas
Potter County Courts Building
501 Fillmore, Suite 2-A
Amarillo, Texas 79101

January 27, 1988

Mr. Kelly Bickerstaff
McCLESKEY HARRIGER BRAZILL & GRAF
P.O. Drawer 6170
Lubbock, Texas 79493

Re: Kerr Construction Company and the City of Lubbock v. The Plains National Bank of Lubbock, No. 07-86-0205-CV

Dear Mr. Bickerstaff:

In the above captioned cause, the Court this day overruled Appellee's Motion to Publish Opinion, of which you will please take due notice.

Very truly yours,

PEGGY CULP, Clerk

/s/ JoAnn Glover
JoAnn Glover, Deputy

bw

xc: Mr. Donald M. Hunt
CARR EVANS FOUTS & HUNT
P.O. Box 2585
Lubbock, Texas 79408

Mr. J. Worth Fullingim
City Attorney's Office
P.O. Box 2000
Lubbock, Texas 79457

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

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Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793 (Tex. 1984) 3
Witt v. Harlan, 2 S.W. 41 (Tex. 1886) 3

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Tex. R. App. P. 90(h) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

---

1. At the outset of its brief in opposition, Paribas suggests that the Fifth Circuit's opinion in this case represents a conscientious effort to apply "well-settled principles of Texas law." Br. in Opp. at 1. The opinion itself does not support that suggestion.

As Paribas acknowledges, the Fifth Circuit cited only two Texas decisions. Br. in Opp. at 1-2 n.1. One, *Republic National Bank v. Northwest National Bank*, 578 S.W. 2d 109 (Tex. 1978), was cited only for the uncontroverted proposition that a letter of credit is a contract between the issuer and the beneficiary. *See* Pet. App. 6a.[1] The

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[1] The Fifth Circuit also cited its own earlier decision in *East Girard Savings Ass'n v. Citizens National Bank & Trust Co.*, 593 F.2d 598 (5th Cir. 1979), for the same proposition.

other, *B. A. Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App. —— Dallas 1986, no writ), was cited as "cf." authority for the proposition that the letter of credit at issue here contained "no uncertainty . . . as to its expiration date." Pet. App. 9a.

In thus citing *B. A. Commercial*, the Fifth Circuit completely ignored the Texas court's rationale. The district court below explained:

> *B A Commercial* . . . supports Exxon's position. In that case the court construed a letter of guaranty that required Hynutek to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynutek made demand upon the guarantor at the end of January.
>
> . . . [T]he court in *B A Commercial* identified and applied the rules of construction that resolve this case.
>
> > [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
> >
> > * * * *
> >
> > [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.
>
> *B A Commercial*, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

Pet. App. 15a. The district court correctly concluded, in light of *B. A. Commercial* and other Texas authorities, that Paribas's suggested reading of the letter of credit in this case was contrary to the purpose of the contracting parties and therefore was wrong.

The Fifth Circuit ignored not only the district court's application of Texas authorities but also the rules of

contract construction that the Texas courts in *B. A. Commercial* and *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, application for writ of error pending), found controlling:

> (1) "If two constructions are possible, a construction rendering the contract possible of performance will be preferred to one that renders its performance impossible or meaningless." *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984).
>
> (2) When contractual provisions appear to conflict, the first provision appearing in the document controls. *Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886).
>
> (3) A letter of credit must be construed against the issuer. *Temple-Eastex*, 672 S.W.2d at 798.[2]

In short, the Fifth Circuit's opinion does not conform to "well-settled principles of Texas law." Br. in Opp. at 1.

2. The Fifth Circuit's failure properly to apply Texas law was made manifest by the decision in *Kerr Construction*. Paribas argues that *Kerr Construction* "would have been accorded [no weight] in a Texas state court." Br. in Opp. at 4. That is wrong.

If this case had not been removed to federal court, it would have proceeded in state court in parallel with *Kerr Construction*. If it had been decided by an intermediate court of appeals in the same manner as *Kerr Construction*, the Texas Supreme Court would have been presented with two cases having virtually identical facts and holdings; if it had been decided by an intermediate court of appeals in a manner contrary to *Kerr Construction*, the Texas Supreme Court could and would have been asked to consolidate the cases and resolve the con-

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[2] Instead, the Fifth Circuit cited two of its own decisions, *Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154 (5th Cir. 1982), and *Chevron Oil Co. v. E. D. Walton Construction Co.*, 517 F.2d 1119 (5th Cir. 1975), for the proposition that interpreting a contract against its author is "a rule of construction that *generally* applies only to clarify ambiguity." Pet. App. 5a (emphasis added).

flict. *See* Pet. 14-15. In either event, the Texas Supreme Court would have given thoughtful consideration and accorded substantial weight to the opinion of the intermediate court of appeals in *Kerr Construction*.

By the same token, if the Fifth Circuit had certified the question of contract interpretation in this case to the Texas Supreme Court for consideration in tandem with *Kerr Construction*, as Exxon requested, the Texas Supreme Court would have been able to assess and evaluate the Fifth Circuit's reasoning as well as that of the intermediate court of appeals in *Kerr Construction*. The Fifth Circuit's refusal to certify, and its hasty disposition of Exxon's second petition for rehearing, indicates an unwillingness to subject its handling of the legal issue in this case to the scrutiny of the Texas Supreme Court —an unwillingness that is fundamentally at odds with the open acceptance of state law required by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Cf. Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) ("it is the duty of the Federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state").

3. Paribas's opposition to certiorari is based exclusively on the fact that the opinion in *Kerr Construction* has not been published. But Paribas, like the Fifth Circuit, is somewhat over-eager on that score. The issue of publication remains open. As Paribas concedes, a motion to publish "is still pending" before the Texas Supreme Court. Br. in Opp. at 2 n.3. Once the Texas Supreme Court acts on the pending application for writ of error in *Kerr Construction*, the "opinion previously unpublished shall forthwith be released for publication, if the [Texas] Supreme Court so orders." Tex. R. App. P. 90(h).[3]

---

[3] Paribas incorrectly asserts that, in the meantime, it is a violation of Texas Rules of Appellate Procedure for Exxon even to

Publication of the opinion in *Kerr Construction* is likely if the writ of error is refused and is particularly likely if it is refused with the notation "no reversible error;" such a notation would place the explicit imprimatur of the Texas Supreme Court on the opinion of the intermediate court of appeals. Especially in light of that possibility, this case should not be finally adjudicated adversely to Exxon in the federal courts in advance of a decision by the Texas Supreme Court in *Kerr Construction*. Under *Erie*, Exxon is entitled to have its Texas contract construed and enforced in accordance with Texas law in the same manner as if the litigation had proceeded in Texas courts.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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refer to the unpublished opinion in *Kerr Construction* either here or in the Fifth Circuit. As their very name implies, those Rules govern procedure only in Texas courts. *See* Tex. R. App. P. 1(a). Moreover, the Rules do not bar motions to consolidate for the purpose of resolving conflict.

SUPREME COURT, U.S.
FILED
JUN 30 1988
JOSEPH F. SPANIOL, JR.

(4)

No. 87-1467

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal court sitting in diversity should consider and apply relevant post-judgment developments in state law that are brought to its attention while the diversity case remains *sub judice*.*

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* Petitioner Exxon Company, U.S.A., is a division of Exxon Corporation, whose affiliates and partially owned subsidiaries are listed in Pet. App. H.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 65-76) is reported at 828 F.2d 1121. The opinion of the district court (J.A. 56-61) is not officially reported but is reprinted at 828 F.2d 1127.

JURISDICTION

The judgment of the court of appeals (J.A. 77) was entered on October 8, 1987. A timely petition for rehearing was denied on December 8, 1987 (J.A. 78). The petition for a writ of certiorari was filed on March 4,

1988, and granted on April 25, 1988. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULES INVOLVED

The relevant provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution, of the Rules of Decision Act, 28 U.S.C. § 1652 (1982), and of Rules 90 and 114 of the Texas Rules of Appellate Procedure are set forth in Appendix A, *infra*.

STATEMENT

1. This case arises out of a dispute over the proper construction, under Texas law, of an "irrevocable standby letter of credit," J.A. 66, issued by respondent Banque de Paris et des Pays-Bas ("Paribas") for the benefit of petitioner Exxon Company, U.S.A. ("Exxon"). The nature and function of letters of credit, and in particular of so-called "standby" or "guaranty" letters of credit, were described by the Texas Supreme Court in *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 112-13 (Tex. 1978):

> Generally, a true letter of credit is the third contract in a complex of three independent contracts. The first contract is the agreement between parties to the underlying obligation; typically, this is the contract between the obligor and obligee. The second contract is ordinarily between the bank or other person (the issuer) and the obligor (the account party), which precipitates the issuance of the letter of credit. The third contract, or the letter of credit, is between the issuer and the obligee (the beneficiary), which provides that the issuer will make payment to the beneficiary upon the presentation of a draft and certain documents (a documentary draft) or simply upon presentation of a draft (a clean letter) . . . .
>
> . . . One particular development has been the "standby credit" or "guaranty credit" whereby the

> issuer agrees to pay the beneficiary upon presentment of documentation indicating that the account party has defaulted on a payment obligation. Distinguished from the traditional credit, the standby credit is used primarily to finance or secure an underlying intangible or money indebtedness undertaken by the account party such as a promissory note.

The standby letter of credit in this case was issued by Paribas to secure the obligation of Houston Oil & Refining, Inc. ("Houston Oil"), to deliver 558,000 barrels of crude oil to Exxon.

2. In July, 1981, Exxon "had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil." J.A. 66. To deal with this temporary surplus, Exxon entered into a contract with Houston Oil to make reciprocal deliveries of crude oil. Exxon agreed to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981, and Houston Oil "agreed to deliver the same amount of crude to Exxon during September through December, 1981." J.A. 56. The contract required Houston Oil "to secure its obligation by a letter of credit in favor of Exxon for $19,530,000." *Id.*

Houston Oil applied to respondent Paribas to issue the necessary "irrevocable standby letter of credit to cover the value of the oil delivered by Exxon." J.A. 66. Paribas agreed to do so and "charged Houston [Oil] a fee of $53,000 for establishing the credit." J.A. 67. A copy of the letter of credit was delivered to Exxon as the beneficiary. *Id.*

The letter of credit stipulated that the amount of the credit would be payable upon Exxon's submission, *inter alia*, of a "[s]tatement signed by an authorized representative certifying that Houston Oil . . . has failed to deliver to Exxon . . . 558,000 barrels of [crude oil] between September and December, 1981." J.A. 8. The letter of credit further specified in a succeeding paragraph, however, that this signed statement and other re-

quired "[d]ocuments must be presented not later than October 31, 1981." J.A. 9. Before issuing the letter of credit, Paribas itself noted "the apparent inconsistency" of these terms, under which "the letter expired *on October 31*, yet covered deliveries *between September and December*." J.A. 67 (emphasis in original). The apparent effect of this inconsistency was to condition payment upon presentation of proof of a breach of the underlying contract before any such breach could have occurred. Yet "Paribas never sought to amend the letter to remove the contradiction or to notify Exxon." J.A. 57.

Exxon satisfied its obligation to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981. J.A. 10. Houston Oil made no reciprocal deliveries of crude oil to Exxon in either September or October. J.A. 12. Sometime prior to October 31, Exxon became aware, as Paribas had earlier, of the apparent internal contradiction in the letter of credit. J.A. 68. Exxon asked Houston Oil to have the letter amended to correct the expiration date. *Id.* Houston Oil represented that it would do so, but it never did. J.A. 68-69.

Nor did Houston Oil make the required reciprocal deliveries of crude oil. "Exxon learned sometime in November that [Houston Oil] was going to default." J.A. 57. Exxon "presented the certification of . . . default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely." *Id. See also* J.A. 14, 18. Houston Oil then agreed to compensate Exxon for its failure to deliver the crude oil, but it later defaulted on that agreement also. J.A. 59-60.

3. On October 6, 1982, Exxon instituted this action against Paribas in the 234th Judicial District Court of Harris County, Texas, to recover on the letter of credit. J.A. 3-7. Paribas removed the case to the United States District Court for the Southern District of Texas, where jurisdiction rested on 28 U.S.C. § 1332(a)(2). J.A. 19-

21. The case came before District Judge Hughes, who had been a Texas state court judge before his appointment to the federal bench. 1 *Almanac of the Federal Judiciary* 42-43 (1988).

Judge Hughes ruled for Exxon on cross-motions for summary judgment. He began his analysis by noting that the terms of the letter of credit appeared to cancel one another and render performance impossible:

> Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that [Houston Oil] failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. . . .
>
> . . . Obviously Exxon could not have certified on October 31 that [Houston Oil] had not delivered through the end of the following two months.

J.A. 56, 58.

These considerations, Judge Hughes reasoned, brought into play two important rules of contract construction under Texas law: "[i]nconsistencies must be resolved against the party who drew the contract," and "contracts must be construed to render performance possible." J.A. 57. He concluded that these rules foreclosed a reading of the letter of credit that would cause the time for presentment to expire before it had become possible for Exxon to certify Houston Oil's failure to deliver the crude oil. The judge also noted that *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.—Dallas 1986, no writ), involving interpretation of a letter of guaranty, further demonstrated that Texas law would not countenance a construction that would frustrate the parties' essential purpose in securing the letter of credit. J.A. 58. Accordingly, Judge Hughes held that Texas law dictated "[a] construction in favor of Exxon." J.A. 57.

4. On October 8, 1987, a divided panel of the Fifth Circuit reversed. The panel majority consisted of Circuit Judges Jolly and Rubin, who are from Mississippi and Louisiana, respectively. 2 *Almanac of the Federal Judiciary* at 14, 5-6. Although the panel majority formally made reference to the Texas version of the Uniform Commercial Code, it made only passing (and incomplete) mention of the Texas decisions and rules of contract construction on which the district court had relied. Instead, the majority proceeded as if the case could appropriately be decided solely on the basis of an understanding of general principles of commercial law. Citing a diverse body of non-Texas decisional law and general legal treatises, handbooks, and other non-Texas authorities, the majority reversed because its reading of those authorities led it to conclude that "the obligation of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date." J.A. 65-66.

Circuit Judge Garza, who had served on the United States District Court for the Southern District of Texas before his appointment to the Fifth Circuit, 2 *Almanac of the Federal Judiciary* at 24, dissented on the ground that the panel majority had failed to follow Texas law:

> The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.
>
> I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil . . . still had the months of November and December to return to Exxon the oil [it] had received under the original contract between Houston Oil . . . and Exxon.
>
> I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct.

J.A. 75-76.

The court denied Exxon's timely petition for rehearing on December 8, 1987. J.A. 78.

5. On November 17, 1987, the Court of Appeals for the Seventh District of Texas at Amarillo decided precisely the same issue of Texas law in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied).[1] *Kerr Construction*, like this case, involved an effort to recover on a letter of credit with inconsistent terms relating to certification and presentment or expiration. But the Texas court, unlike the Fifth Circuit, held that in such circumstances the inconsistent expiry date is unenforceable. The court reasoned that the letter of credit must be enforced in a sensible manner that gives the beneficiary an opportunity to make presentation for payment once it becomes possible to certify that the obligor or account party has failed to perform in accordance with the terms of the underlying contract.

The two cases are on all fours, except as to result. In *Kerr Construction*, the letter of credit had been issued on September 17, 1984, and provided that presentation for payment was to be accompanied by a signed statement that the obligor or account party had failed to complete its performance of a contract for paving improvements "within ten (10) months," J.A. 30, *i.e.*, by July 17, 1985. The expiry date, however, was January 1, 1985 (later extended to July 1, 1985). J.A. 31-32. The underlying contract remained uncompleted on July 17, 1985, and the beneficiary presented the letter for payment on that date. J.A. 32. The issuer refused payment on the ground that the letter had expired. *Id.*

The Texas intermediate court of appeals held that the presentation for payment had been timely:

> It is well settled that the rules of construction for ordinary contracts govern letters of credit. It is

[1] The opinion in *Kerr Construction* is reproduced at J.A. 29-36.

> equally well settled that where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. In this instance, it is undisputed that the first provision of the instrument [relating to certification] is in direct and irreconcilable conflict with the last provision of the instrument [relating to expiration] . . . .
>
> It [also] is well settled [that] when there is an irreconcilable conflict between provisions in the agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration.

J.A. 32-33 (citations omitted). Because the basic "purpose of the letter of credit was assurance to the [beneficiary]," J.A. 35, the court concluded that the express expiry date, which would have rendered such assurance illusory, must give way.

The court appended at the end of its opinion the legend "Do not publish. Tex R. App. P. 90(e)." J.A. 36.

6. Exxon did not become aware of *Kerr Construction* until after the denial of rehearing and issuance of mandate in this case. When it did learn of *Kerr Construction*, Exxon immediately called that decision to the attention of the Fifth Circuit by moving for recall of mandate and for leave to file a second suggestion for *en banc* consideration (including a request that the issue be certified to the Texas Supreme Court). J.A. 26-38, 39-41.[2] The Fifth Circuit denied the motion for recall of mandate on the ground that under Tex. R. App. P. 90(i) "[u]npublished opinions shall not be cited as authority by counsel or by

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[2] In the Fifth Circuit, "'[a] suggestion for rehearing *en banc* will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.'" *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985), quoting from the Internal Operating Procedures of the Fifth Circuit.

the court." J.A. 79. The motion for leave to file a second suggestion for rehearing *en banc* was denied without comment. J.A. 80.

7. This Court granted certiorari on April 25, 1988. Two days later, on April 27, 1988, the Texas Supreme Court denied review in *Kerr Construction* but also overruled a motion for publication of the intermediate appellate court's opinion in that case.[3]

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in this case is fundamentally in error. The court violated the basic principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), by resting its decision not on Texas law but on its understanding of general commercial law. The court then compounded that error by refusing to reconsider in light of the intervening and conflicting decision in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied).

A. *Kerr Construction* squarely conflicts with the Fifth Circuit's decision in this case. The facts of the two cases are essentially identical, and the results are diametrically opposite. Although *Kerr Construction* was decided by an intermediate appellate court, its holding "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). In fact, *Kerr Construction* is firmly grounded in well-established Texas rules of contract construction and is unquestionably correct as a matter of Texas law. In any event, the Texas Supreme Court's subsequent denial of review forecloses the federal courts from adopting a contrary view of Texas law.

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[3] A copy of the order of the Texas Supreme Court is set forth as Appendix B, *infra*. A renewed request for publication currently is pending before the state intermediate appellate court.

B. This case is governed by *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538 (1941), and *Huddleston v. Dwyer*, 322 U.S. 232 (1944). In *Vandenbark*, this Court held that a diversity court's duty to apply state law does not expire with the initial entry of judgment but instead continues "until such time as a case is no longer *sub judice*." 311 U.S. at 543. The reach of this principle is illustrated by *Huddleston*. There, after a court of appeals sitting in diversity had denied a second and untimely petition for rehearing that asked for reconsideration in light of an intervening state decision, this Court granted certiorari and, after argument, vacated and remanded with instructions to reconsider. This constitutes "a clear holding that it is the duty of the federal courts at any stage in the course of a proceeding, even after denial of a petition for rehearing in the Court of Appeals, to follow, if applicable, a state court decision although rendered subsequent to the rendition of judgment by a federal court." *Jones v. Schellenberger*, 225 F.2d 784, 791 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). *See also Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970). The Fifth Circuit breached that duty in this case by refusing to reconsider in light of *Kerr Construction*.

Although the duty imposed by *Vandenbark* and *Huddleston* appears to be mandatory, the Fifth Circuit's refusal to reconsider would have been erroneous even if reconsideration had been a matter of discretion. The predominant interest of justice in diversity litigation is uniformity of outcome in state and federal courts. *E.g.*, *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). There are no strong countervailing interests warranting disparity of outcome here. The decision in *Kerr Construction* is clear, controlling, and easy to apply, and Paribas had not relied upon the Fifth Circuit's judgment in any manner that would have rendered reconsideration un-

just. The balance of interests dictated reconsideration. *Gondeck v. Pan American World Airways*, 382 U.S. 25 (1965). By refusing to reconsider, the Fifth Circuit improperly shifted the burden of achieving uniformity to this Court, through the certiorari process, or (if the Court had denied certiorari) to the district court (or back to the court of appeals) under Fed. R. Civ. P. 60(b).

C. Now that this Court has granted certiorari, it has assumed the duty of a diversity court to apply existing state law. *Huddleston* demonstrates that once this Court accepts jurisdiction over a diversity case, it is obligated to give effect to intervening developments in state law even if the judgment below may have appeared correct when entered. *See also Nolan v. Transocean Air Lines*, 365 U.S. 293, 295 (1961) (remanding for reconsideration in light of a new state decision that "was not brought to the attention of, and was not considered by," the court of appeals). Such cases are specific illustrations, in the context of diversity, of the principle, first stated in *United States v. The Schooner Peggy*, 5 U.S. 102 (1801), that when there has been an intervening change in the law, "it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the [lower] court may do so." *Gulf, Colorado & Santa Fe R. Co. v. Dennis*, 224 U.S. 503, 507 (1912). Accordingly, whether or not the Fifth Circuit erred in refusing to reconsider, this Court should either decide this case on the basis of the intervening decision in *Kerr Construction* or remand to the Fifth Circuit with instructions to do so.

D. Diversity courts are not governed by state procedural rules, such as the Texas rule of appellate procedure that bars citation of unpublished decisions in Texas courts. Because there is no uniform federal procedure with respect to citation of unpublished decisions, this Court must identify and establish a diversity procedure that remains

true to the *Erie* objective of uniformity of outcome and also speaks to the jurisprudential and constitutional concerns that are raised by no-citation procedures.

1. Application of state no-citation procedures would frustrate the *Erie* objective of uniformity of outcome. An unpublished state decision represents the result actually reached in state court; the very purpose of *Erie* is to ensure that a diversity court faced with the same facts will reach the same result. *Kerr Construciion* involved essentially the same facts as this case and arose at the same time; under *Erie*, the results should be the same. Moreover, the very fact that the opinion in *Kerr Construction* was not published indicates that it involved only a routine and noncontroversial application of settled principles of Texas law. It would be perverse if, as a consequence, a diversity court were forced to pretend that the opinion does not exist.

Because diversity courts are obligated to determine state law from "all the available data," *West v. American Tel. & Tel. Co.*, 311 U.S. at 237, they routinely look to unpublished state decisions for guidance on matters of state law. Diversity courts have declined to follow state no-citation procedures that would prevent them from knowing how legal disputes actually are resolved in state courts. *See, e.g., Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986). Of course, a lower state court's unpublished opinion need not be accepted uncritically. But in the absence of persuasive evidence that the state supreme court would disagree with the result reached by the lower state court, a diversity court faced with essentially the same facts should strive to reach the same result.

2. Application of state no-citation procedures also would conflict with other important federal interests.

Procedural rules that forbid citation of unpublished judicial opinions have been extensively criticized by judges,

scholars, practitioners, and other commentators. Such rules clash with important jurisprudential values and disserve fundamental interests of the legal system. By undermining the doctrine of *stare decisis*, no-citation rules cause "confusion, repetition, nonuniformity, and even skepticism about the way [courts] do [their] job." *National Classification Committee v. United States*, 765 F.2d 164, 175 (D.C. Cir. 1985) (Wald, J., separate statement). Diversity courts need not and should not exacerbate these problems by adopting state no-citation procedures.

In addition, no-citation procedures raise substantial constitutional doubts. As prior restraints on what may be said in or to a court, such procedures face "a heavy presumption against . . . constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). They not only curb speech but do so in a manner that directly impairs the right to petition for redress of grievances. Due process and equal protection concerns also are implicated. *See, e.g.*, 28 U.S.C. 10th Cir. Rules, App III (1988 Supp.) (Holloway, C.J., dissenting from promulgation of rule). These constitutional doubts would have to be resolved before diversity courts could bind themselves to state no-citation procedures.

E. If this Court nevertheless concludes that diversity courts are obligated to follow state no-citation procedures, it would be appropriate, especially in view of the Fifth Circuit's failure otherwise to make a conscientious effort to ascertain and apply state law, to certify the underlying question of Texas law to the Texas Supreme Court.

ARGUMENT

THIS DIVERSITY CASE IS GOVERNED BY TEXAS LAW AS ILLUSTRATED BY AND APPLIED IN THE INTERVENING DECISION OF THE TEXAS INTERMEDIATE COURT OF APPEALS IN *KERR CONSTRUCTION*

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that federal courts sitting in diversity must apply state common law. By historical coincidence, certiorari was granted in this case on the fiftieth anniversary of the announcement of the decision in *Erie*. The opinion below, however, reads as if *Erie* had never been decided.

The Fifth Circuit's "opinion does not rest its conclusions upon its appraisal of Texas law or Texas decisions." *Griffin v. McCoach*, 313 U.S. 498, 503 (1941). The court did not, even once, acknowledge its obligation to follow state law. Instead, the court proceeded as if the issue before it could and should be resolved as a matter of general commercial law. Its opinion thus reflects the jurisprudence not of *Erie* but of *Swift v. Tyson*, 41 U.S. 1, 18 (1842), which proclaimed that the Rules of Decision Act had no application "to questions of general commercial law, where [the proper function of a diversity court is] to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

Of course, *Erie* overruled *Swift*. Justice Story's vision of a diversity jurisdiction unencumbered by state common law has long since been discredited. Yet, even so, it is as true here as in *Rosenthal v. N.Y. Life Ins. Co.*, 304 U.S. 263, 264 (1938), that the "Court of Appeals decided the questions . . . as matters of general law according to the weight of authority. . . . It is enough to say that the questions to be decided are those of state

law and should have been determined according to the decisions of the state court." The Fifth Circuit's opinion thus bears witness to the fact that, although half a century has passed since *Erie* was decided, its teaching still has not been taken fully to heart.

By deciding this case as a matter of general commercial law, the Fifth Circuit had committed reversible error even before it compounded that error by refusing to reconsider in light of the intervening and conflicting decision in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0206-CV (Tex. App.—Amarillo 1987, writ denied). Consequently, even if *Kerr Construction* were to be disregarded, the judgment below could appropriately be reversed and the case remanded with instructions to ascertain and follow Texas law. *Griffin v. McCoach*, 313 U.S. at 504; *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (per curiam). Such a disposition of this case would have the salutary effect of reaffirming the centrality of the *Erie* doctrine and warning against laxness in its application.

In a sense, *Kerr Construction* does little more than highlight and dramatize the Fifth Circuit's failure to apply Texas law. But especially in view of that decision, which addressed precisely the same issue of Texas law presented by this case, the judgment below must be reversed.

A. The Intervening Decision In *Kerr Construction* Demonstrates The Proper Application Of Texas Law To The Facts Of This Case

Kerr Construction speaks to the very same question of contract construction that the Fifth Circuit had before it in this case. *Kerr Construction* holds that, as a matter of Texas law, when the certification provision of a letter of credit conflicts with the presentation clause or expiry date set forth in a later paragraph, the certification provision controls. This means that a prema-

ture expiry date does not foreclose the beneficiary (Exxon) from validly presenting the letter of credit for payment by the issuer (Paribas) once it becomes possible to certify, in the manner prescribed by the certification provision, that the obligor whose performance the letter was intended to secure (Houston Oil) has failed to perform in accordance with the terms of the underlying contract. If the Fifth Circuit had followed the Texas rules of contract construction applied in *Kerr Construction*, it would have decided this case, as the district court did, in Exxon's favor.

Kerr Construction was decided by an intermediate appellate court rather than by the Texas Supreme Court, but this did not justify the Fifth Circuit's refusal to reconsider. "An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940). The decision of a state intermediate appellate court on an issue of state law "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 233, 237 (1940). *See also Six Companies of California v. Joint Highway District*, 311 U.S. 180, 188 (1940). Under that standard, *Kerr Construction* should be followed and may not be disregarded.

1. Kerr Construction *was correctly decided as a matter of Texas law*

The Texas intermediate court of appeals began its analysis in *Kerr Construction* with the observation, which the Texas Supreme Court has explicitly endorsed, that "the rules of construction for ordinary contracts govern letters of credit." J.A. 32. *See Temple-Eastex Inc. v.*

Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984); *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 115 (Tex. 1978). The *Kerr Construction* court then proceeded to invoke and apply two well-established Texas rules of contract construction, each of which dictated that the letter of credit there at issue be construed in favor of the beneficiary.

First, the court noted that under Texas law "where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail." J.A. 33. As another Texas court has explained,

> If the provisions in question . . . are so repugnant as to create a genuine ambiguity, . . . then we apply the rule that the provision first appearing in the agreement must be given controlling effect over the later conflicting provision. The rule is thus stated in 13 Tex. Jur. 2d, Contracts, § 142, p. 323:
>
> > . . . if there is an irreconcilable conflict between two clauses, by which the meaning of the contract is rendered obscure or doubtful, the provisions of the first clause will be deemed to be controlling.

Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc., 460 S.W.2d 225, 228 (Tex. App.—Dallas 1970, no writ) (citations omitted). The Texas Supreme Court has endorsed this "rule which gives effect to an earlier over a later provision." *Southland Royalty Co. v. Pan American Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964). Indeed, the rule (which the Fifth Circuit in this case completely ignored) has an ancient provenance in Texas. *See Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886).

Second, the court reasoned that "when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the

agreement is entitled to the most consideration." J.A. 33. This also is hornbook law in Texas: "If a variance exists between two clauses in the instrument, . . . the clause which contributes most essentially to the agreement is the one that is entitled to the greater consideration." *Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc.*, 460 S.W.2d at 228 (quoting 13 Tex. Jur. 2d Contracts § 142 at 323).

The certification provision contributes more essentially to a standby letter of credit than does the expiry date. The expiry date is of course important, but it is largely unrelated to the central purpose of the agreement. In contrast, the certification provision constitutes the very heart of the bargain: it defines the issuer's core undertaking, *i.e.*, to provide security for the obligor's performance of the underlying contract. Because there was a direct conflict between the certification provision and the expiry date in *Kerr Construction*, as there also was in this case, the Texas court (unlike the Fifth Circuit) correctly applied Texas law when it gave the former provision precedence over the latter.

Moreover, "[i]n Texas, a writing is generally construed most strictly against its author. . . . As a result, the bank's letter of credit is construed most strictly against the bank because it drafted the letter of credit." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798. *See also Republic National Bank v. Northwest National Bank*, 578 S.W.2d at 115. The result in *Kerr Construction* (unlike the result below in this case) conforms to this well-established rule.

Finally, "a construction rendering the contract possible of performance will be preferred to one that renders its performance impossible or meaningless." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798. *See also Republic National Bank v. Northwest National Bank*,

578 S.W.2d at 115; *Portland Gasoline Co. v. Superior Marketing Co.*, 243 S.W.2d 823, 824 (Tex. 1951). If the expiry date of the letter of credit in *Kerr Construction* had been controlling, the beneficiary (like Exxon here) would have had no protection at all against nonperformance of the underlying contract: the letter of credit would have been an empty and meaningless promise, and the contracting parties' purpose in obtaining it would have been totally frustrated. As in *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 716 (Tex. App.—Dallas 1986, no writ), which involved a similar issue arising under a letter of guaranty, a literal application of the expiry date "would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties." A literal application, in other words, would have violated the most basic of all canons of contract construction: "to reach a reasonable result consistent with the apparent intent of the parties." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798.

For all these reasons, the result in *Kerr Construction* was dictated by existing Texas precedent. There was nothing to suggest, even before the Texas Supreme Court denied review, "that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. at 237.

2. *The Texas Supreme Court's denial of review in* Kerr Construction *forecloses federal courts from adopting a contrary view of Texas law*

Even if it were not otherwise evident that *Kerr Construction* had been correctly decided as a matter of Texas law, the Texas Supreme Court's subsequent denial of review forecloses a diversity court from insisting upon a contrary view of Texas law. When a state supreme court, by denying review, has let stand a decision of an intermediate appellate court, it is not the province of the federal courts (at least in the absence of a clear con-

flict among the lower state courts) to speculate concerning how the state supreme court would have decided the case if review had been granted. In this situation, a federal court is "not at liberty to depart from the state appellate court's resolution of these issues of state law." *Hicks v. Feiock*, 108 S. Ct. 1423, 1428 (1988). *See also, e.g., Kolender v. Lawson*, 461 U.S. 352, 355-56 n.4 (1983); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 466-69 (1940).

B. The Fifth Circuit Should Have Reconsidered Its Judgment In This Case In Light Of *Kerr Construction*

In *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941), this Court explained that a diversity court's duty to adhere to state law does not expire with the initial entry of judgment but instead continues for as long as a case remains *sub judice*:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon the federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.

The Court had occasion to illustrate the reach of this principle in *Huddleston v. Dwyer*, 322 U.S. 232 (1944). There, an intervening and conflicting state decision had been brought to the attention of the court of appeals in a second petition for rehearing, after an initial timely petition had been denied. When the court of appeals refused to reconsider, this Court granted certiorari and, after argument, vacated and remanded for reconsideration on the authority of *Vandenbark*.

This case is governed by *Erie*, *Vandenbark*, and *Huddleston*. It calls for little more than a routine application of the *Vandenbark* principle on facts virtually indistinguishable from those in *Huddleston*. The intervening state decision in *Kerr Construction* was handed down while the initial petition for rehearing in this case was

pending, and it was brought to the attention of the court of appeals shortly after that petition was denied and considerably before the filing of a timely petition for certiorari. In these circumstances, the *Vandenbark* principle, as illustrated by its application in *Huddleston*, required the Fifth Circuit to vacate its prior judgment and reconsider in light of *Kerr Construction*.

1. *This Court's decisions in* Vandenbark *and* Huddleston *imposed a duty to reconsider*

In *Vandenbark* this Court was concerned about the effect of a change in state law occurring after a district court had entered final judgment in a diversity case but before the case was submitted on appeal. The Court held that in such circumstances a federal court of appeals must follow the new state decision, even though the result may be to "cause the reversal of judgments which were correct when entered." 311 U.S. at 543. In so holding, the Court reasoned broadly that a federal court has a continuing duty to follow and apply changes in state law "until such time as a [diversity] case is no longer *sub judice*." 311 U.S. at 543. This implies that just as a trial judgment must be reversed on the basis of an intervening and conflicting state decision, so must a still-reviewable appellate judgment be vacated and reconsidered. "Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." *Id.*

Of course, even before *Vandenbark* it was understood that *Erie* itself requires a court of appeals to reconsider its prior judgment when a timely petition for rehearing discloses the existence of contrary state authority. *See American Nat. Ins. Co. v. Belch*, 100 F.2d 48 (4th Cir. 1938). Insofar as situations of that kind are concerned, *Vandenbark* simply made explicit a requirement that was already implicit. *See, e.g., Maxey v. Freightliner Corp.*, 665 F.2d 1367 (5th Cir. 1982) (*en banc*); *Doggrell v. Southern Box Co.*, 208 F.2d 310 (6th Cir. 1953). The

question this Court confronted in *Huddleston* was whether the duty to follow and apply new state decisions extends beyond not only entry of final judgment by the court of appeals but also denial of rehearing.

The facts in *Huddleston* were essentially the same as those here. In a diversity case involving Oklahoma law, the Tenth Circuit had entered judgment based upon its "examination of the Oklahoma authorities." 322 U.S. at 234. The following sequence of events then occurred:

> Petitioners filed a timely petition for rehearing which was denied on September 1, 1943. On December 17, 1943, petitioners moved for leave to file a second petition for rehearing which the Circuit Court of Appeals denied. In their second petition, petitioners brought to the attention of the court and relied upon an opinion of the Supreme Court of Oklahoma in *Wilson v. City of Hollis*, . . . which had superseded its earlier opinion on which the Circuit Court of Appeals had relied in its opinion in this case.

Id. at 235. Because the court of appeals had failed to amend its judgment to reflect the intervening state decision, this Court granted certiorari and, after argument, "vacate[d] the judgment below and remand[ed] the cause to the Circuit Court of Appeals so that it may reconsider its decision in the light of the decisions and opinions of the Supreme Court of Oklahoma in the *Wilson* and later cases." *Id.* at 237-38. "Thus, here is a clear holding that it is the duty of the federal courts at any stage in the course of a proceeding, even after denial of a petition for rehearing in the Court of Appeals, to follow, if applicable, a state court decision although rendered subsequent to the rendition of judgment by a federal court." *Jones v. Schellenberger*, 225 F.2d 784, 791 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

The proper course of action in cases such as this is illustrated by *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S.

829 (1970). There, the court of appeals initially had entered judgment in May, 1969, and had denied rehearing in June. Three weeks later, the Florida Supreme Court "reversed the intermediate appellate court decision on which we had relied." *Id.* at 429. The losing party in the Second Circuit, having discovered the intervening Florida decision while its petition for certiorari was pending, immediately moved for leave to file a petition for rehearing out of time in the Second Circuit. In a carefully reasoned opinion, the Second Circuit determined that it should reconsider:

> In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was "*sub judice*" the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term "*sub judice*" might be. Under circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, *see* F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice

> we should consider what effect the Florida Supreme Court's [intervening] decision . . . will have on our prior judgment in this case.

Id. at 429-30.

In *Braniff*, the intervening state decision was not called to the attention of the court of appeals until after a petition for certiorari already had been filed. On at least one occasion, moreover, this Court has granted rehearing from the denial of certiorari on the basis of an intervening state decision that was not even handed down until certiorari already had been denied. *Conner v. Simler*, 367 U.S. 486 (1961). Thus, "[t]he *Erie-Vandenbark* principle has been applied where a change in state law has occurred . . . between a first and second petition for rehearing in the court of appeals [*Huddleston*], during the pendency of a petition for a writ of certiorari [*Braniff*], and after a denial of certiorari but prior to the filing of a timely petition for rehearing [*Conner*]." Comment, *Civil Procedure*—Erie *Outcome Determination Principle Requires Rule 60(b)(6) Relief from Final Judgment After Change in State Law*, 29 Rutgers L. Rev. 921, 931 (1976).

In light of these decisions, it could be argued that, inasmuch as a case remains *sub judice* at least until the time for filing a petition for rehearing in this Court has expired, a court of appeals continues until that time to be subject to the duty of revising its judgment to conform to intervening changes in state law. On the other hand, one commentator, in discussing the "outer limit for the period during which a case is *sub judice*," has suggested that a "reasonable line might be drawn when a case is denied certiorari or decided on certiorari such that Supreme Court review is no longer available except through the rehearing procedure." Note, *Pierce v. Cook & Co.: Change in State Law as a Ground for Relief from a Federal Judgment*, 124 U. Pa. L. Rev. 843, 857 (1976). *Accord, Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336,

337 (3d Cir. 1982). That debate need not be joined here. This case does not test or explore the outer limits of the *Vandenbark* principle. The intervening state decision in *Kerr Construction* was brought to the Fifth Circuit's attention well before the filing of a timely petition for certiorari, when the case unquestionably remained *sub judice* and the court of appeals was free to act without fear of infringing upon this Court's supervening jurisdiction. Under *Huddleston*, when a party brings the new state decision to the attention of the court of appeals *before* the timely filing of a petition for certiorari, as Exxon did in this case, the court's duty to rehear is manifest.

That is as it should be. The purpose of *Erie* "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). This purpose can be achieved only if the federal courts of appeals are subject to a continuing duty to consider and apply post-judgment developments in state law at least until a diversity case becomes subject to the supervening jurisdiction of this Court (or until the time expires for invoking that jurisdiction). Otherwise, exercise of the diversity jurisdiction can give rise, as here, to the essentially simultaneous issuance of conflicting state and federal decisions, with the difference in outcome turning on nothing more than the accident of diversity. *Erie*, *Vandenbark*, and *Huddleston* all forbid that result.

2. Even if there had been no duty to reconsider, the Fifth Circuit's refusal to reconsider would have been an abuse of discretion in the circumstances of this case

Normally, consideration of a second and untimely petition for rehearing is a matter of discretion. *Vandenbark* and *Huddleston* appear to remove that discretion where,

as here, the second petition is based upon an intervening and conflicting state decision that demonstrates that a diversity case that is still *sub judice* has been wrongly decided as a matter of state law. But if the Fifth Circuit did have some residual measure of discretion, its refusal to rehear was a clear abuse of that discretion.

When a court receives a second petition for rehearing based upon intervening events, it is called upon to balance the general interest in finality against the more specific interests of justice in the immediate case. The "established doctrine [is] that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules [relating to finality].'" *Gondeck v. Pan American World Airways*, 382 U.S. 25, 26-27 (1965) (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

The predominant interest of justice in diversity litigation is the "realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). This overriding objective of uniformity of outcome militates strongly in favor of revising judgments in diversity cases, while they remain *sub judice*, to conform to the judgments in intervening and conflicting state decisions. Even apart from *Vandenbark* and *Huddleston*, therefore, rehearing in this case should have been granted as a matter of course in the absence of strong countervailing interests of justice.

There were no such countervailing interests present here. To begin with, this is not a case where the intervening state decision had only tangential or merely arguable relevance. Rehearing would not have entailed an elaborate and studied parsing of an ambiguous state court opinion or a judgmental extension of the opinion's reasoning to fit importantly different facts. *Cf. Nolan v. Transocean Air Lines*, 290 F.2d 904 (2d Cir.), *cert.*

denied, 368 U.S. 901 (1961). The Texas court in *Kerr Construction* squarely held, in factual circumstances virtually identical to those here, that where the certification provision and expiry date of a letter of credit conflict, the certification provision controls. That holding, which is directly contrary to the Fifth Circuit's holding in this case, could easily have been applied by the Fifth Circuit on rehearing. Moreover, Paribas had not changed its position or otherwise relied upon the Fifth Circuit's decision in any manner that would have rendered rehearing inappropriate or unjust.

In circumstances such as these, denial of rehearing inappropriately shifts the burden of achieving uniformity onto other courts and other procedural mechanisms. In the first instance, the burden is shifted to this Court through the certiorari process. If the disappointed litigant cannot obtain a rehearing in the court of appeals, he naturally turns to this Court. The Court has responded on a number of occasions by granting certiorari and summarily vacating or reversing and remanding for reconsideration in light of the intervening state decision. *See, e.g., Blaauw v. Grand Trunk Western R. Co.*, 380 U.S. 127 (1965); *Carter Oil Co.* v. *Welker*, 317 U.S. 592 (1942); *Chase Securities Corp. v. Vogel*, 312 U.S. 666 (1941). This procedure, however, is cumbersome and institutionally inefficient. It obviously would be preferable for the court of appeals, which already is familiar with the case, to undertake reconsideration without requiring this Court to act first. That consideration was given considerable weight by the Second Circuit in *Braniff* (albeit in an opinion that left unclear whether the court thought it was exercising discretion or acting under compulsion of *Vandenbark*). *See* 424 F.2d at 430.

If this Court denies certiorari in a diversity case, the burden of responding to post-judgment developments in state law then shifts back to the court of appeals or district court, which will be called upon to consider the mat-

ter in the context of Fed. R. Civ. P. 60(b). Rule 60(b) permits judgments to be reopened in light of intervening changes in the law, and at least one court of appeals has concluded that it authorizes the judgment in a diversity case to be reconsidered in light of a state decision handed down after the denial of certiorari (and also after the expiration of time for filing a petition for rehearing in this Court). *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir. 1975) (*en banc*), *cert. denied*, 423 U.S. 1079 (1976). When the intervening state decision has been announced even before the timely filing of a petition for certiorari, it makes no sense for a court of appeals to force the disappointed diversity litigant first to file a petition for certiorari, and then to file a motion under Rule 60(b), when the relief requested can be provided sooner and more directly by simply granting rehearing in the first place.

Furthermore, it should not be forgotten that Exxon originally brought this action in state court. As a result of the decision below, and the Fifth Circuit's failure to correct that decision in light of *Kerr Construction*, Exxon has been denied the benefit of the substantive law that would have governed its claim if Paribas had not removed the action to federal court. This result strikes at the very heart of the *Erie* principle. To permit a defendant like Paribas to evade liability through the simple expedient of removing to federal court "create[s] discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). It is just plain wrong to deny to a plaintiff who sued in state court the benefit of an intervening state decision that establishes or confirms his right to recover under state law.

C. This Court Has Now Assumed Responsibility, Under *Huddleston* and *The Schooner Peggy*, For Ensuring That This Case Is Decided According To Existing State Law

This Court's exercise of the certiorari power is perhaps the purest example of nonreviewable discretion in American law. For obvious reasons, the Court does not find it possible and cannot be expected to correct every erroneous appellate decision that comes before it on petition for writ of certiorari. If a court of appeals erroneously fails to reconsider its judgment in a diversity case in light of an intervening state decision—whether the erroneous failure constitutes the breach of a mandatory duty or instead only an abuse of discretion—this Court itself is not duty-bound to repair that failure. The *Vandenbark* principle does not reach that far.

Once the Court grants certiorari, however, the situation is different. When it exercises its discretionary jurisdiction to hear a diversity case, this Court, like the lower federal courts sitting in diversity, is subject to "the duty . . . to apply state law . . . in accordance with the then controlling decision of the highest state court." *Vandenbark*, 311 U.S. at 543. *Huddleston* itself is the prime example. The intervening state decision in that case had not been announced until after the court of appeals had denied the initial petition for rehearing. When it vacated and remanded for reconsideration in light of that intervening decision, this Court did not explicitly state that the court of appeals had erred in denying the second petition for rehearing. Instead, the Court explained:

> a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones.

322 U.S. at 236. Because the decision of the Tenth Circuit in that case appeared correct as a matter of state law

"when the judgment was rendered," and the state court "disapproved of [its] former rulings and adopted different ones" only "in the meantime" between entry of the Tenth Circuit's judgment and submission of the case to this Court, the "appellate review" identified in the above passage necessarily encompassed this Court's own review on certiorari.

Huddleston therefore means that once this Court accepts jurisdiction over a diversity case, it is obligated to give effect to intervening post-judgment developments in state law. This reading is confirmed by *Nolan v. Transocean Air Lines*, 365 U.S. 293, 295 (1961), where, after argument, the Court vacated and remanded for reconsideration in light of a new state decision that "was not brought to the attention of, and was not considered by" the court of appeals. *Cf. Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 534 n.6 (1958) (determining state law by reference to a state decision that "came down several months after the Court of Appeals decided this case").

Huddleston, *Nolan*, and even *Vandenbark* itself are merely specific illustrations, in the context of diversity, of the larger principle first stated by this Court in *United States v. The Schooner Peggy*, 5 U.S. 102, 109-10 (1801):

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

This Court, no less than the lower federal courts, is subject to this principle. When there has been an interven-

ing change in the applicable law, "it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the state court may do so." *Gulf, Colorado & Santa Fe R. Co. v. Dennis*, 224 U.S. 503, 507 (1912). *See also, e.g., Cort v. Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281-82 (1969). In some instances the Court has even modified its own judgments in order to reflect post-judgment changes in the law. *See, e.g., 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795 (1947).

The rule of *The Schooner Peggy* requires reversal here whether or not the Fifth Circuit erred in refusing to rehear. This Court now has assumed responsibility for ensuring that this diversity case is decided according to existing state law, and the intervening and conflicting decision in *Kerr Construction* amply demonstrates that the judgment below is at odds with the law of Texas as it applies to the facts of this case.

In these circumstances, this Court could vacate and remand to the court of appeals with instructions to reconsider in light of the intervening state decision, as it did in *Huddleston, Nolan, Blaauw*, and other similar cases. Alternatively, because the underlying issue of state law is not truly "in doubt or deserving further canvass," *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956), the Court could appropriately dispose of the case once and for all by reversing outright on the authority of the body of Texas law applied by and incorporated in *Kerr Construction*. Although the latter approach would require this Court to decide the issue of state law itself, it has the important advantage of leading to the prompt and final conclusion of litigation. But whether the Court renders final judgment or instead just vacates and remands, its disposition of this case should be informed by and should confirm the duty of the federal

judiciary, including this Court, to decide diversity cases in accordance with existing state law.

D. The Texas Rules Of Appellate Procedure Do Not Preclude Diversity Courts From Considering Unpublished State Court Opinions

The Texas intermediate appellate court that decided *Kerr Construction* chose not to publish its opinion. J.A. 36. The Fifth Circuit referred to that fact when it denied Exxon's motion for recall of mandate in this case. J.A. 79. The Fifth Circuit apparently believed that reconsideration in light of *Kerr Construction* was either foreclosed or rendered unnecessary or inappropriate by Tex. R. App. P. 90(i), which provides as a state rule of appellate procedure that "[u]npublished opinions shall not be cited as authority by counsel or by a court." But diversity courts are not governed by state procedural rules. To the contrary, "both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law." *Hanna v. Plumer*, 380 U.S. at 471.

Unlike *Hanna*, this case does not present a classic instance of conflict between state and federal procedure. On the one hand, the state procedural rule itself is honored in the breach. Although the purport of Rule 90(i) is that unpublished opinions "should not be cited," *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983), it is in fact not uncommon for Texas courts to cite and rely upon such opinions. *See, e.g., Allegheny Int'l Credit Corp. v. Segal*, 735 S.W.2d 552, 554 n.3 (Tex. App.—Dallas 1987, no writ); *Hare v. State*, 713 S.W.2d 396, 397 (Tex. App.—El Paso 1986, writ ref'd); *Weldon v. Hill*, 678 S.W.2d 268, 272 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Gonzales v. State*, 672 S.W.2d 618, 620 (Tex. App.—Amarillo 1984, no writ). On the other hand, there is no clear-cut federal procedure with respect to the citation of unpublished opinions. This Court's

Rules do not address the issue. The Fifth Circuit allows citation and follows its own unpublished opinions as "binding precedent." *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987). *See also* 5th Cir. R. 47.5.3. The practices of the other federal courts of appeals are not uniform in this regard.[4]

This case therefore does not present a simple (or difficult) choice between established federal and state procedures. Rather, it requires the identification and establishment of a diversity procedure that remains true to the *Erie* objective of uniformity of outcome and also speaks to the jurisprudential and constitutional concerns raised by prohibitions against citation of unpublished judicial opinions.

1. *Application of state no-citation procedures would frustrate the* Erie *objective of uniformity of outcome*

"The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. at 109. *See also, e.g., Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601, 4604 (U.S. June 13, 1988) (No. 87-

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[4] In addition to the Fifth Circuit, the Third, Fourth, Sixth, and Eleventh Circuits permit citation of unpublished opinions (although the latter three courts "disfavor" the practice). 3d Cir. R. 21(i); 4th Cir. R. 36.5; 6th Cir. R. 10(f); 11th Cir. R. 36-1. The Temporary Emergency Court of Appeals has no rule with respect to the citation of unpublished opinions and therefore presumably permits it. The remaining federal courts of appeals prohibit citation at least of their own unpublished opinions. D.C. Cir. R. 11(c); 1st Cir. R. 45(b)(6); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 8(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3; Fed. Cir. R. 18(c). *See generally* D. Stienstra, *Unpublished Opinions: Problems of Access and Use in the Courts of Appeals* (Federal Judicial Center 1985); W Reynolds & W. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981).

352); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Of course, the principle of uniformity is not ironclad. When state and federal rules conflict, the choice of which rule to apply is thought to require a balancing of "the policy underlying the federal rule against the objective of achieving identical results in federal and state courts." Comment, *supra*, 29 Rutgers L. Rev. at 933. *See also Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. at 537-39; Note, *Choice of Procedure in Diversity Cases*, 75 Yale L.J. 477 (1966). In the context of this case, however, both interests are on the same side of the balance. There is no tension here between the application of a federal rule that allows consideration of unpublished state court opinions and achievement of identical results in federal and state courts: consideration of unpublished state decisions will further, not hinder, the *Erie* objective of uniformity of outcome.

The first and most obvious point to make is that an unpublished state decision represents the result actually reached in state court. The very purpose of *Erie* is to ensure that a federal court faced with the same facts will reach the same result. The logic of *Erie* itself therefore strongly militates in favor of consideration of unpublished as well as published state decisions.

This conclusion has special force in the circumstances of this case. The facts of this case are identical in all essential respects to those in *Kerr Construction*. This means that the state decision is relevant here not just as a statement of general legal principles, and not just as an example of the application of those principles to materially distinguishable facts, but as direct proof of how the state courts would actually have decided this particular controversy. Furthermore, this case and *Kerr Construction* are parallel and contemporaneous. The state decision is not a mere historical curiosity; it demonstrates the manner in which the state courts currently deal with the underlying issue in this case. Consequently, if the

federal courts in this case are to carry out the mandate of *Erie*, *i.e.*, to reach the same result that the state courts would have reached, they must look at what the state courts in fact do. They must look at *Kerr Construction*.

Nonpublication does not render *Kerr Construction* an unreliable guide to Texas law. To the contrary, nonpublication means that, in the judgment of both the state intermediate appellate court and the Texas Supreme Court, *Kerr Construction* involved nothing more than a routine and noncontroversial application of settled principles of Texas law. Under Tex. R. App. P. 90(c), an opinion is not published unless it "(1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." In other words, nonpublication signals that *Kerr Construction* was a garden variety case for which, as a matter of Texas law, only one outcome was considered possible. It would make a mockery of the *Erie* principle of uniformity if federal courts were forced to ignore a state decision that went unpublished precisely because it was understood to stand in the undisputed mainstream of state law.

Paribas argues, however, that a federal court sitting in diversity is constrained to look only to those authorities to which a state court itself would look. But that confuses a superficial concern, *i.e.*, how judges go about learning the law, with the deeper motive of *Erie*, *i.e.*, to reach the same result that a state court would reach (or, as here, that a state court already has reached).

It is both appropriate and necessary for diversity courts to consider unpublished state decisions if they are to achieve the *Erie* objective of uniformity of outcome. Diversity courts are obligated to determine state

law from "all the available data." *West v. American Tel. & Tel. Co.*, 311 U.S. at 237. *See also Bernhardt v. Polygraphic Co. of America*, 350 U.S. at 210 (Frankfurter, J., concurring) (in applying *Erie*, "law is not restricted to what is found in Law Reports, or otherwise written"). They "may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and 'the majority rule.'" 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507 at 100-03 (1982) (citations omitted). A diversity court therefore also should be permitted to consider the result reached by three state appellate judges on the identical issue, whether or not their opinion was "mailed to the West Publishing Company." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984). To rely upon secondary materials in the face of a contrary state decision directly on point would constitute a major step back toward the jurisprudence of *Swift v. Tyson*.

The Sixth Circuit early and correctly reached the conclusion that diversity courts should avail themselves of the learning provided by unpublished state intermediate appellate court opinions:

> We . . . cannot ignore this data so definitely presented as to what the state law is upon the precise point at issue in the instant case. . . . [I]f the present suit had been brought in [a state trial court], no reason is advanced for supposing that the [state intermediate appellate court] would depart from its previous ruling or that the [state supreme court] would grant the review which it withheld before.

Gustin v. Sun Life Assur. Co. of Canada, 154 F.2d 961, 963 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946). Since that time, it has become accepted practice for federal courts sitting in diversity to look to unpublished state decisions for guidance on matters of state law. *See, e.g.*,

Gatewood v. Fiat, S.p.A., 617 F.2d 820, 825 (D.C. Cir. 1980); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486, 489 (9th Cir.), *cert. denied*, 429 U.S. 887 (1976); *Bradley v. General Motors Corp.*, 512 F.2d 602, 605 (6th Cir. 1975); *Fiat Motors of North America, Inc. v. Mayor & Council of Wilmington*, 619 F. Supp. 29, 37 (D. Del. 1985). Even in *King v. Order of United Commercial Travelers*, 333 U.S. 153, 160-61 (1948), which held that a diversity court is not required uncritically to follow an unpublished decision of a state *nisi prius* court that "would not constitute a precedent in any other case in [the state courts]," this Court nevertheless observed that the court of appeals "properly attributed some weight to the [unpublished] decision." *Cf. Rowan Cos. v. United States*, 452 U.S. 247, 261 n.17 (1981); *Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975).

A federal court may be less sure than a state court of its understanding of state law. Unpublished state decisions are a valuable supplement to the materials otherwise at hand. State judges are likely to know how they and their colleagues have decided like cases, with or without a no-citation procedure. But adherence to a no-citation procedure in diversity would prevent the federal courts from knowing how legal disputes actually are resolved in state courts. This would directly frustrate the *Erie* objective of uniformity of outcome. In recognition of this fact, diversity courts have expressly declined to follow state no-citation procedures. *See Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986); *In re Schmelzer*, 480 F.2d 1074, 1076 n.1 (6th Cir. 1973).

The correct approach is that stated in *In re York*, 43 Bankr. 36, 37-38 n.1 (Bankr. M.D. Tenn. 1984) (emphasis in original):

> It is not necessary for us to determine whether this court is *bound* by the [unpublished] *Gourley* decision [of a lower Tennessee court]. We believe the *Gourley*

> decision is a reasonable interpretation of Tennessee law which is consistent with reported precedents. There is no reason to think that the Tennessee Supreme Court would hold differently if confronted with the issues presented here. Accordingly, we choose to follow the rationale of *Gourley* as indicative of Tennessee law.

Such an approach comports with and furthers the *Erie* objective of uniformity of outcome. It also conforms to the standard established by this Court in such cases as *Fidelity Union Trust* and *West*. It means that although a federal court sitting in diversity may not be bound by the unpublished decision of a state intermediate appellate court, just as it may not be bound by a published decision of the same court, it nevertheless must consider and should follow such a decision "in the absence of more convincing evidence of what the state law is." *Fidelity Union Trust*, 311 U.S. at 178.

Finally, consideration of the unpublished state decision is particularly appropriate here. If Paribas had not removed this case to federal court, the litigation would have proceeded in state court in parallel with *Kerr Construction*. The state trial and intermediate appellate courts presumably would have decided the case correctly under Texas law in conformity with the result in *Kerr Construction*. But if the case had been decided by the state intermediate court of appeals in a manner contrary to *Kerr Construction*, Exxon could have moved to consolidate the two cases in the Texas Supreme Court and asked that court to resolve the conflict. Nonpublication of one or both of the appellate court opinions would not have prevented the Texas Supreme Court from considering the two cases and opinions together and making an informed and uniform application of Texas law. Since the Texas Supreme Court could have looked to *Kerr Construction* in determining how to decide this case, it was wrong for the Fifth Circuit to refuse to do so.

2. *Application of state no-citation procedures also would conflict with other important federal interests*

i. *No-citation procedures clash with important jurisprudential values*

Procedural rules that forbid citation of unpublished judicial opinions clash with important jurisprudential values and disserve fundamental interests of the legal system. The heart of the problem is that such rules "interfere with responsible judicial decisionmaking by insulating a substantial portion of the court's product from the demands of stare decisis." W. Reynolds & W. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1200 (1978). "The development of 'hidden' precedents mocks the concept of stare decisis," W. Richman & W. Reynolds, *The [Ohio] Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 Ohio St. L.J. 313, 314 (1985), and thus "renders the doctrine of *stare decisis* ineffective as a safeguard against unprincipled judicial decisionmaking." Report of the Subcommittee on Unpublished Opinions of the Advisory Committee on Procedures to the United States Court of Appeals for the District of Columbia Circuit 23 (May 1984) (hereinafter cited as "Subcommittee Report").[5]

The doctrine of *stare decisis* is

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). No-citation procedures are "inconsistent with the doctrine of

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[5] Copies of the Subcommittee Report have been served upon opposing counsel and lodged with the Clerk of this Court.

stare decisis in a fundamental way." Subcommittee Report at 21. "[*S*]*tare decisis* cannot operate as a 'workable doctrine' as long as courts, while adjudicating sets of identical facts are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of [not permitting citation of] one [or both] set[s] of results." G. Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 Cal. St. B.J. 386, 445 (1973).

A court's ability to invoke a no-citation procedure and thereby deny precedential value to its own decisions results in a "pernicious diminution in both judicial responsibility and judicial accountability." W. Reynolds & W. Richman, *supra*, 78 Colum. L. Rev. at 1199. "Decreased accountability in turn leads to both the perception and the possibility of inconsistent, arbitrary, and even biased decisions." W. Richman & W. Reynolds, *supra*, 46 Ohio St. L.J. at 315. By substituting *ad hoc* decision-making in place of the doctrine of *stare decisis*, no-citation procedures cause "confusion, repitition, nonuniformity, and even skepticism about the way [courts] do [their] job." *National Classification Committee v. United States*, 765 F.2d 164, 175 (D.C. Cir. 1985) (Wald, J., separate statement).

No-citation procedures "undermine one of the imperatives of an appellate system—that the system should promote uniform and coherent enunciation and application of the law." P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* 38 (1976). The problem of nonuniformity is quite serious. When the doctrine of *stare decisis* breaks down, "no litigant can be certain that his case will be decided . . . in accordance with principles of law followed in other, similar cases." G. Kanner, *supra*, at 443. Nonuniformity of result means, very simply, "unfairness to litigants." D. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Just. Sys. J. 405, 418 (1981). But it also represents the collapse of a "fundamental premise of the common law system of ad-

judication . . . that judges are required to decide like cases in like fashion." W. Richman & W. Reynolds, *supra*, 46 Ohio St. L.J. at 331. Moreover, the practice of issuing non-citable opinions "leave[s] the law in a state of irremediable disarray since it prevents counsel from calling attention to contradictory or chaotic decisions." D. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 Marq. L. Rev. 581, 589 (1978).

The resulting nonuniformity and unpredictability of outcome "impede[] client counseling, and may leave counsel groping in darkness." P. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality under Challenge?*, 42 Md. L. Rev. 766, 783 n.41 (1983). This adversely affects efforts at voluntary compliance. "Where the law is secret or where it is not founded in rational, enduring principles, there cannot be intelligent obedience." Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 38 U. Pitt. L. Rev. 309 (1977). In addition, by "spawning a body of secret law," *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting), the courts "undermine public trust in the judiciary." Subcommittee Report at 28. *Cf.* B. Cardozo, *Nature of the Judicial Process* 34 (1921) ("[a]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts").

Federal courts sitting in diversity need not and should not exacerbate these problems by adopting state no-citation procedures. Instead, the proper procedure in diversity is for the federal court to permit citation of an unpublished state decision, to consider the facts and the result in the state case, and (if the decision is by a lower state court) to assess whether the state supreme court would be likely to reach the same result. Only in this manner can a diversity court achieve the objectives of equal justice and uniformity of outcome that are shared both by *Erie* and the doctrine of *stare decisis*.

ii. *No-citation procedures are fraught with constitutional difficulties*

In prior cases, this Court has chosen to leave "to another day" the task of determining the validity of rules that forbid citation of unpublished judicial opinions. *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 258-59 n.1 (1978). *See also R&T Construction Co. v. St. Louis-San Francisco R. Co.*, 444 U.S. 941 (1979) (denying certiorari); *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) (denying leave to file petition for writ of mandamus or prohibition). That issue need not be decided here, either. The federal courts sitting in diversity are under no compulsion to follow state no-citation procedures, and for the reasons already discussed it would be inadvisable for them to do so. But if this Court otherwise were inclined to authorize the diversity courts to adopt such state procedures, the Court first would have to consider and resolve the substantial constitutional doubts that such procedures raise.

As prior restraints on what litigants or their counsel may say in court, no-citation procedures face a "heavy presumption against . . . constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), for they entail "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). No-citation rules are unlikely to pass muster under the standards that this Court has articulated in the past, *i.e.*, (1) that the restrained speech be shown to pose a serious and imminent threat to a protected competing interest, *Wood v. Georgia*, 370 U.S. 375, 383-85 (1962); (2) that the rule restraining speech be narrowly drawn, *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968); and (3) that less restrictive alternatives not be available, *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 563.

Moreover, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374 (1947). "It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution[s] that ha[ve] the chief responsibility for protecting constitutional rights." *United States v. Grace*, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part).

Prohibitions against citation of unpublished opinions not only curb speech, they do so in a manner that directly impairs the right to petition for redress of grievances, which is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 519 (1972); *Edwards v. South Carolina*, 372 U.S. 229, 234-38 (1963). Just as states cannot "bar [persons] from resorting to the courts to vindicate their legal rights," *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 7 (1964), they should not be able to muzzle the litigant once he gets to court.

Due process concerns also are implicated. "Due process requires that there be an opportunity to present every available defense." *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). *See also, e.g., Holt v. Virginia*, 381 U.S. 131, 136 (1965); *Powell v. Alabama*, 287 U.S. 45, 69 (1932). In a case such as this, to bar Exxon from citing *Kerr Construction* would be "like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recog-

nized, and you shall not be heard." *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876). "Such a practice is irreconcilable with the command of the Due Process Clause." *Little v. Streater*, 452 U.S. 1, 12 (1981) (invalidating state statute that "forecloses what is potentially a conclusive means for [a party] to . . . exonerate himself"). Chief Judge Holloway recently voiced these concerns in dissenting, with two other judges, from the Tenth Circuit's adoption of a no-citation procedure:

> Each ruling, published or unpublished, involves the facts of a particular case and the application of law —constitutional, statutory or decisional—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.

28 U.S.C. 10th Cir. Rules, App. III (1988 Supp.) (citation omitted).

The problem arises not only because a litigant is foreclosed from citing favorable authority but also because the court places itself in a position where it can rely upon a body of secret law that the litigant is unable to address, distinguish, or criticize. *See* W. Reynolds & W. Richman, *supra*, 78 Colum. L. Rev. at 1196-99. This possibility is inconsistent with fundamental fairness:

> The validity and moral authority of a conclusion depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious

> loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Finally, no-citation procedures are difficult to square with the constitutional guarantee of equal protection, that "'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Such procedures create the risk, as in this case, that essentially identical factual situations will be treated differently even though they are purportedly governed by the same substantive body of law. Moreover, in Texas, and presumably elsewhere, this risk is compounded by low publication rates and a "wide variation in the application of [publication] standards." F. Evans, J. Warren & L. Liberato, *To Publish or Not to Publish?*, 24 Houston Lawyer 18, 19 (July-Aug. 1986). In 1983 the publication rates among the Texas intermediate appellate courts ranged from a high of only 52 percent to a meager low of 13 percent. M. Osborn, *Publication of Opinions by the Texas Courts of Appeals*, 47 Tex. B.J. 655, 656 (June 1984). When so few opinions are published, the likelihood of unequal treatment is great. And when publication is apparently so random, a diversity court that looks only to published decisions will get an arbitrary and distorted view of state law—a view that, in turn, can lead to disparate results in state and federal courts and thereby defeat the overriding objective of *Erie*.

E. In The Alternative, This Court Should Certify The Underlying Issue Of State Law To The Texas Supreme Court

Especially in light of *Kerr Construction*, the underlying question of Texas law in this case admits of but a

single answer. If this Court concludes that *Kerr Construction* must be disregarded, however, it would be appropriate, in view of the Fifth Circuit's failure even to acknowledge the primacy of state law, to invoke Tex. R. App. P. 114(a), which provides that this Court and the federal courts of appeals may certify to the Texas Supreme Court "questions of law of this state which may be determinative of the cause then pending" in federal court.

Exxon asked the Fifth Circuit, as an alternative to reconsideration, to utilize this certification procedure "in order that the federal court might secure an authoritative construction of State law [and thereby furnish] a demonstration of cooperative judicial federalism." P. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1959). *See* J.A. 54. The Fifth Circuit refused to do so, but the option of certification remains open to this Court. "Such certification would further the *Erie* principle that federal courts should not make state law, and that state law applied in federal court should not differ from state-court state law." Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344, 362 (1963) (footnote omitted).

To be sure, use of a certification procedure "in a given case rests in the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). Accordingly, this Court could, as it did in *Lehman Brothers*, remand to the court of appeals for reconsideration of the matter of certification. But where, as here, the court of appeals not only has refused to certify but also has exhibited an unwillingness to undertake the deep, patient, and probing analysis of state law that *Erie* requires, it would be entirely appropriate for this Court itself to certify the dispositive question of state law for decision by the Texas Supreme Court. *See Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certifying question of

state law "on its own motion"); *Aldrich v. Aldrich*, 375 U.S. 249 (1963) (same).

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for reconsideration in light of Texas law, including the decision in *Kerr Construction*, or the question of Texas law should be certified to the Texas Supreme Court.

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APPENDICES

APPENDIX A

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution in pertinent part provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Rules 90 and 114 of the Texas Rules of Appellate Procedure provide:

Rule 90. Opinions, Publication and Citation.

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissent-

ing from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished Opinions shall not be cited as authority by counsel or by a court.

Rule 114. Certification of Questions of Law by United States Courts

(a) Certification of Questions of Law. The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Contents of the Certification Order. A certification order shall set forth:

(1) The questions of law to be answered;

(2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(3) The names of each party to the pending cause.

(4) The names and addresses of counsel for each party.

(c) Preparation of Certification Order. The certification order shall be prepared by the certifying court and forwarded to the Supreme Court of Texas by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(d) Fees and Costs. Fees and costs shall be the same as in direct appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(e) Briefs and Oral Argument. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the clerk of the Supreme Court within thirty days from the date of receipt of the notice and the opposing parties shall file an answering brief within fifteen days of service of copies of the opening brief. Briefs shall be in the manner and form of Rules 131 and 136, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this court. If granted or ordered, argument shall be as provided in Rule 172, Texas Rules of Appellate Procedure.

(f) Notice to the Attorney General. When the constitutionality of a Texas statute is the subject of a certified question to which the State of Texas or an officer, agency or employee of the state is not a party, the clerk of the Supreme Court shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.

(g) The Answer to the Certified Question. After all motions for rehearing have been overruled, the written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(h) All time limits shall be in accordance with the Texas Rules of Appellate Procedure, so far as reasonably applicable.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

April 27, 1988

No. C-7185

THE PLAINS NATIONAL BANK OF LUBBOCK

vs.

KERR CONSTRUCTION COMPANY *et al.*

From Lubbock County, Seventh District

Application of petitioner for writ of error to the Court of Appeals for the Seventh District, together with amicus curiae's, Exxon Company, U.S.A., motion to publish and motion to supplement the motion to publish and brief previously filed by amicus curiae Exxon Company, U.S.A., having been duly considered, it is ordered that said motion to supplement the motion to publish be granted, and that the motion to publish, as supplemented, be, and hereby is, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, The Plains National Bank of Lubbock, pay all costs incurred on this application.

(5)

Supreme Court, U.S.
FILED
JUL 12 1988
CLERK

No. 87-1467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONER

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v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

On July 6, 1988, the Texas intermediate court of appeals that decided *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App. —— Amarillo 1987, writ denied), granted the appellants' motion to publish its opinion in that case. A copy of the Clerk's letter notifying counsel of this action is appended hereto as Appendix A.

Respectfully submitted,

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APPENDIX A

[SEAL]

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RE: Kerr Construction Company and the City of Lubbock v. The Plains National Bank of Lubbock; No. 07-86-0205-CV

Gentlemen:

In the above-captioned cause, the Court this day granted Appellants' Motion to Publish Opinion and overruled, as moot, the Motion to Publish Opinion filed by

Exxon Company, U.S.A., as Amicus Curiae, of which you will please take due notice.

Very truly yours,

/s/ Peggy Culp
PEGGY CULP, Clerk

ccr

xc: (with copy of opinion)
Texas Lawyers Weekly Digest
Opinion Service
LEXIS
West Publishing Company

No. 87-1467

Supreme Court, U.S.
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AUG 5 1988
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

—*v.*—

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
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BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a federal court sitting in diversity is required to follow a state intermediate appellate court decision which is at variance with principles of law enunciated by the highest court of that state and which has been found to be erroneous by the highest court of that state?

RULE 28.1 STATEMENT

Respondent's parent, affiliates and non-wholly-owned subsidiaries are listed in Appendix 1 to the Brief in Opposition previously filed in this Court. Amendments necessary to make that list currently accurate are included in Appendix 1 attached hereto.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,

Petitioner,

—against—

BANQUE DE PARIS ET DES PAYS-BAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

STATUTES AND RULES INVOLVED

This case involves the Rules of Decision Act, 28 U.S.C. § 1652 (1982), rules 90 and 133 of the Texas Rules of Appellate Procedure, section 22.001(a)(6) of the Texas Government Code and section 5.106 of the Texas Business and Commercial Code. These rules and statutes are set forth in the Appendices hereto.

COUNTERSTATEMENT OF THE CASE

This case arises out of the failure by petitioner ("Exxon") adequately to protect itself with respect to a crude oil exchange agreement that Exxon made with Houston Oil & Refining, Inc.

("Houston") in July 1981. In connection therewith, respondent ("Paribas") issued a letter of credit to Exxon, exactly as requested by its customer, Houston, but Exxon did not seek payment under the letter of credit until after its expiration date. The Fifth Circuit, applying well-settled principles of Texas letter of credit law, correctly held that Paribas was not required to pay the letter of credit. *Exxon Co., U.S.A.* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121, *reh'g denied*, 835 F.2d 1433 (5th Cir. 1987), *cert. granted*, 108 S. Ct. 1572 (1988).

The letter of credit at issue was requested by Houston over seven years ago. On July 9, 1981, Houston submitted an application (App. 7A)[1] to Paribas for a $19,530,000 irrevocable standby letter of credit to be issued in favor of Exxon for the account of Houston in connection with an exchange of oil between the two oil companies. *Id.* Houston directed Paribas to pay the letter of credit only upon presentation by Exxon of certain specified documents, including a

> [s]tatement signed by an authorized representative [of Exxon] certifying that Houston Oil & Refining, Inc. has failed to deliver to Exxon Company, U.S.A. 558,000 barrels of [crude oil] between September and December, 1981.

Id. Houston also expressly specified that the letter of credit was to expire on October 31, 1981. *Id.*; J.A. 66.

Paribas noted the apparent discrepancy between the proposed expiration date and the above documentary provision of the letter of credit application. J.A. 67. Paribas therefore contacted Houston, before issuing the letter of credit, to verify that the conditions stated in the application were indeed what Houston intended. *Id.* Houston assured Paribas, who was not a

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1 "App. _____" indicates reference to pages in the appendices hereto. "J.A. _____" indicates reference to pages in the Joint Appendix. "Exxon Br. _____" and "Exxon Supp. Br. _____" indicate, respectively, reference to pages in the Brief and Supplemental Brief for Petitioner. "DX _____" indicates reference to defendant's exhibits and "_____ depo. _____" indicates reference to deposition testimony, included in the record on appeal. "R. _____" indicates reference to pages in the record on appeal.

party to the oil exchange agreement between Exxon and Houston, that the terms as stated in the application were correct. J.A. 67-68; Exxon Br. 3. This confirmation from Houston was specifically noted by Paribas on Houston's application. J.A. 67-68; App. 7A.

Houston's request for the issuance of the $19,530,000 letter of credit was, in effect, a request for an extension of credit by Paribas to Houston in that amount. J.A. 67. As a result, Paribas required Houston to provide security sufficient to cover the credit, and as part of the security arrangement, Paribas blocked certain cash coming into Houston's account. *Id.*

On July 16, 1981, Paribas issued the standby letter of credit using the language supplied by Houston with respect to the documentary provisions and the expiry date. J.A. 8-9; App. 7A. Thereafter, Paribas conferred for a second time with Houston about the apparent contradiction between the documentary provision and the expiration date. J.A. 68. Houston confirmed again that no change in the expiration date was desired. *Id.*

Exxon claims that it "was unaware of the problem" in the letter of credit (J.A. 49), but the fact is that Exxon was fully aware, from the beginning of this transaction in July 1981, of the apparent contradiction in the language of the letter of credit. J.A. 68. In July 1981, Exxon had an established procedure for receiving letters of credit issued in its favor and monitoring their expiration dates. *Id.* On July 20, 1981, Don Meiers, the Exxon employee in charge of this procedure, transmitted a copy of the letter of credit here at issue to three different executives at Exxon familiar with the underlying Houston/Exxon oil exchange transaction. Meiers advised them that the letter of credit "*is due to expire October 31, 1981*" and that it covers Houston's obligation to deliver crude oil to Exxon "*between September and December 1981.*" *Id.* (emphasis added). Although what Exxon calls the "blatantly inconsistent terms" (J.A. 48) of the letter of credit were called to the attention of Exxon's management in July 1981, "[n]o one at Exxon complained or even suggested that these terms were not fully satisfactory." J.A. 68.

Exxon is one of the world's largest companies and a frequent user of letters of credit. Exxon knew from its experience that it could obtain amendment of unsatisfactory letters of credit. *Id.* In dealing with Houston, however, Exxon was essentially dealing with Joe Imparato, Houston's president and a person well-known to Exxon because he had been a former Exxon employee. J.A. 68-69. Exxon's casual approach to this letter of credit therefore suggests that Exxon was relying more on its prior business dealings and relationship with Houston and Imparato for security in this transaction than on the letter of credit issued by Paribas. J.A. 73.

It is also clear that Exxon fully understood the letter of credit had an expiry date of October 31, 1981, and that an extension of the letter of credit would be necessary to protect Exxon. Prior to October 31, 1981, "Meiers brought the problem of Exxon's exposure to loss under the [Houston/Exxon] exchange contract to the attention of higher management at Exxon," and "Exxon asked Houston to obtain an extension of the letter of credit, but did not communicate with Paribas." J.A. 68. Indeed, at no time prior to October 31, 1981, did anyone at Exxon suggest that the letter of credit would be valid through November 1981.

The letter of credit was not extended, and Exxon made no attempt to obtain payment under the letter of credit prior to its expiration.[2] As a result, during November 1981, after the credit expired, Paribas released the funds it held as security for the credit. J.A. 69.

It was not until "sometime in November" 1981 that Exxon learned Houston was not going to meet its obligation to deliver oil to Exxon. Exxon Br. 4. Recognizing that it must do something to recoup the loss which had now been fully realized, Exxon made a presentation of documents to Paribas on November 30, 1981, a month after the letter of credit had expired. J.A. 10-13. The following day, Exxon made a second

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2 Because October 31, 1981 was a Saturday, the documents could also be presented on the next business day, Monday, November 2, 1981. J.A. 67.

presentation of documents to Paribas under the expired letter of credit. J.A. 15-17. Paribas rejected both presentations as untimely because the letter of credit had expired. J.A. 14, 18.

Exxon's reaction to Paribas' rejections was not to protest or immediately commence litigation against Paribas. Instead, Exxon negotiated a new arrangement with Houston as a way for Houston to satisfy its obligations to Exxon under, *inter alia*, the underlying oil exchange agreement here at issue. For nearly a year thereafter, Exxon collected at least $19,000,000 from Houston under that new arrangement. Imparato depo. 58. Only after Houston defaulted under that agreement did Exxon sue Paribas (on October 6, 1982) seeking, in effect, a construction and reformation of the letter of credit—which Exxon had received more than a year earlier—to make Exxon's late presentations timely. J.A. 1-7.

Exxon's action against Paribas was originally commenced in a Texas state court (J.A. 3), and was removed by Paribas to the United States District Court for the Southern District of Texas. J.A. 1, 19. After extensive discovery, both sides moved for summary judgment. R. 104, 444. The district court granted summary judgment for Exxon. J.A. 64. On appeal, however, the Fifth Circuit reversed and directed the entry of judgment for Paribas. J.A. 77.

The majority opinion below, written by Circuit Judge Rubin, discloses that the court of appeals relied heavily on principles of Texas letter of credit law in arriving at its decision.[3] The court noted, *inter alia*, that it was not called upon to clarify "a contract susceptible to more than one interpretation." J.A. 73. The court fully acknowledged that Exxon might not have been able to perform under the letter of credit as written (J.A. 65-66), but if the "expiry date did not satisfy Exxon, it simply should have declined to accept the credit and refused to deliver oil to Houston." J.A. 73. There was "no uncertainty on the face of the letter as to its expiration date" which was "as certain as words permit." *Id.* The court thus held that the letter of credit

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3 *See infra* Point II.

"required no construction and that it terminated on its express expiry date." J.A. 75.

The court also noted that it was not called upon to deal with claims of fraud, inadvertence or mistake:

> Exxon does not suggest that Paribas acted fraudulently. Nor does Exxon allege that Houston specified the expiration date of October 31 as the result of inadvertence or mistake, or that Exxon was mistaken as to that date when it accepted the letter.

J.A. 74. The court rejected Exxon's assertion that Paribas had a duty to Exxon to "make sense" of Houston's application for the letter of credit.[4] *Id.* The court did, however, find—based on Texas law—that Paribas had a duty of good faith to Houston, the bank's customer, and that Paribas discharged that duty by checking with Houston both before and after issuing the credit to make sure that the terms specified in the application were what Houston intended. *Id.* In short, the court below concluded:

> In letter-of-credit transactions, as in many other legal areas, certainty of result and practicality of performance by laymen are of paramount importance. As Exxon asserts, it was required to comply with "whatever requirements that Paribas established" "to the last comma, the last semicolon, . . . and, if they [did] that, they [were] entitled to be paid." It follows that, if Exxon did not do that, it was not entitled to be paid.

J.A. 75.

After judgment was rendered below, Exxon filed with the Fifth Circuit a suggestion for en banc consideration. Exxon Br. 7. On December 8, 1987, the Fifth Circuit denied the suggestion for an en banc rehearing and, treating it as a petition for a panel rehearing, denied that application also. J.A. 78.

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4 Exxon notes that Paribas received a fee for issuing the letter of credit. Exxon Br. 3. That fee, however, was paid to Paribas by Houston, its customer, not by Exxon and was in accord with the usual rate charged to Houston for letters of credit. J.A. 67; DX 4.

In January 1988, an attorney for The Plains National Bank of Lubbock, Texas telephoned Exxon's counsel by mistake and advised him of an opinion issued on November 17, 1987, by the Court of Appeals for the Seventh District of Texas at Amarillo (the "Amarillo court"), one of fourteen intermediate appellate state courts in Texas. J.A. 29, 37-38; *Kerr Constr. Co.* v. *Plains Nat'l Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied). At the time, the *Kerr* opinion was an unpublished opinion and had no precedential value in the State of Texas. J.A. 26-27, 36. The fact that *Kerr* was not published was not happenstance or the result of an oversight by the Amarillo court to forward the opinion for publication. It was the result of a deliberate decision by the Amarillo court that the opinion did not meet the standards for publication under Rule 90(c) of the Texas Rules of Appellate Procedure (App. 3A) and, therefore, was not to be regarded as part of the jurisprudence of the State of Texas. J.A. 36.

Nevertheless, Exxon brought the unpublished opinion to the attention of the Fifth Circuit on January 12, 1988, by filing two motions: a motion to recall the issuance of the Fifth Circuit's mandate, and a motion for leave to file a second suggestion for an en banc rehearing. J.A. 26, 39. While the motions were pending below, the Amarillo court, on January 27, 1988, reconfirmed its initial determination not to publish *Kerr* by denying a motion to publish the opinion. App. 9A. Two weeks after that, the court below denied Exxon's motions, noting, *inter alia*, that Rule 90(i) of Texas Rules of Appellate Procedure provides that unpublished opinions shall not be cited as authority by counsel or by a court. J.A. 79-80; App. 4A.

On March 4, 1988, Exxon filed its Petition for Certiorari in this Court and simultaneously embarked on a truly extraordinary campaign to try to obtain from the Texas state courts some advantage in connection with this litigation. The *Kerr* case was then pending before the Texas Supreme Court on an application by The Plains National Bank of Lubbock, the losing party in *Kerr*, for a writ of error. On March 4, 1988, Exxon, as "amicus curiae," filed a motion in the Texas Supreme Court seeking publication of the Amarillo court's opinion. App. 10A. Exxon

took this step so that the *Kerr* opinion would be available to assist Exxon in the litigation now before this Court.

Exxon also filed on March 4, 1988 a brief in the Texas Supreme Court in which it urged that court to grant the application for a writ of error and to write an opinion affirming the Amarillo court's decision in *Kerr*, or alternatively, to order the *Kerr* opinion published if the application for a writ of error was refused. Brief of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed Mar. 4, 1988). A few days thereafter, Exxon filed a motion to supplement its papers in the Texas Supreme Court in order to file with that court a copy of the Petition for Certiorari which Exxon had filed here. Motion to Supplement of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed Mar. 8, 1988).

On April 27, 1988, two days after this Court granted certiorari, the Texas Supreme Court granted Exxon's motion to supplement and then denied, on the merits, Exxon's supplemented motion to publish the *Kerr* opinion. App. 13A. At the same time the Texas Supreme Court denied the application for a writ of error, thereby indicating that the *Kerr* decision of the Amarillo court was incorrect in some unspecified respect. *Id.*[5]

Rebuffed in its initial attempt to get the *Kerr* opinion published, Exxon then filed, on May 6, 1988, a motion for rehearing of its motion to publish in the Texas Supreme Court based on the fact that certiorari had been granted in this case. Motion for Rehearing of Amicus Curiae Exxon Co., U.S.A., *Plains Nat'l Bank* v. *Kerr Constr. Co.*, No. C-7185 (Tex., filed May 6, 1988). On May 25, 1988, however, the Texas Supreme Court denied Exxon's motion for rehearing for lack of jurisdiction. App. 14A. One week later, that court also denied a motion for rehearing on the application for a writ of error filed by The Plains National Bank of Lubbock. App. 16A.

Having thus failed in its effort to obtain assistance from the Texas Supreme Court, Exxon proceeded to "appeal downwards" to the Amarillo court. Although *Kerr* was not then

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5 *See infra* Point III.

pending in the intermediate appellate court, Exxon filed a motion in that court on June 2, 1988 to obtain publication of the *Kerr* opinion. App. 18A. The basic reason Exxon there assigned for seeking publication of the *Kerr* opinion was the pendency of this case in this Court. App. 19A-20A.

After Exxon filed its motion to publish, the City of Lubbock and the Kerr Construction Company, the winning parties in *Kerr*, also filed a motion to publish the *Kerr* opinion, even though they had not previously sought such action from either the Amarillo court or the Texas Supreme Court while the *Kerr* case was pending.[6] Motion to Publish of the City of Lubbock and Kerr Construction Company, *Kerr Constr. Co.* v. *Plains Nat'l Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied) (filed June 13, 1988). On July 6, 1988, five weeks after Exxon's motion was filed, the Amarillo court granted the motion of the City and of Kerr to publish the *Kerr* opinion, and denied the Exxon motion as moot. Exxon Supp. Br. 1.

SUMMARY OF ARGUMENT

When *Kerr* was called to the attention of the Fifth Circuit and when certiorari was granted by this Court, the *Kerr* opinion was unpublished and, under Texas law, devoid of precedential value. *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986); Tex. R. App. P. 90(i). On July 6, 1988, however, the Amarillo court ordered the *Kerr* opinion published. Thus, issues relating to *Kerr* as an unpublished opinion are moot. *See Honig* v. *Doe*, 108 S. Ct. 592 (1988); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974). The fundamental issue now before the Court is whether any purpose would be served by having the court below reconsider its opinion in the light of *Kerr*. The answer is no.

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6 As noted above, the Amarillo court had previously re-confirmed its initial refusal to publish the *Kerr* opinion at a time when the *Kerr* case was still active and when publishing the opinion might have affected action that the Texas Supreme Court was requested to take in the application for a writ of error filed by The Plains National Bank of Lubbock. App. 9A.

A federal court sitting in diversity is required to apply state law as enunciated by the highest court of the state. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Kerr*, however, ignores the well-settled principles of letter of credit law enunciated by the Texas Supreme Court in a series of cases decided over the past ten years and consistently applied by other Texas courts. *See CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc.* v. *Homestate Savs. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979). These principles require that a beneficiary who fails strictly to comply with the terms and conditions of a letter of credit is not entitled to receive payment under it. *Fina*, 726 S.W.2d at 542; *Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 795. They also mandate that the issuer of a letter of credit incurs no liability on demands for payment presented after the expiry date. *Temple-Eastex*, 672 S.W.2d at 795; *see also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ).

These principles are not altered or modified by the fact that the beneficiary is unable to comply with conditions for payment prior to the expiry date of the letter of credit. *Liberty Nat'l Bank & Trust Co.* v. *Bank of Am. Nat'l Trust & Savs. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955), *cited with approval in Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ); *Hyland Hills Metro. Park & Recreational Dist.* v. *McCoy Enters., Inc.*, 554 P.2d 708 (Colo. Ct. App. 1976), *cited with approval in Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

In the absence of fraud, mistake or scrivener's error, courts will not reform letters of credit. *See, e.g., Fina*, 726 S.W.2d at 541; *Champlin Oil & Ref. Co.* v. *Chastain*, 403 S.W.2d 376, 382-83 (Tex. 1966); *Continental Oil Co.* v. *Doornbos*, 402

S.W.2d 879, 883 (Tex. 1966). Under well-settled contract principles, a letter of credit which is impossible of performance *ab initio* is void and there are no obligations to enforce. *See United States* v. *Ellicott*, 223 U.S. 524, 541 (1912); *Milam Bldg. Co.* v. *Dannelley*, 57 S.W.2d 345, 347 (Tex. Civ. App.—Waco 1933); *Thompson* v. *Waits*, 159 S.W. 82, 84 (Tex. Civ. App.—Austin 1913).

Additionally, the Texas Supreme Court denied an application for a writ of error in *Kerr*, thereby holding, *inter alia*, that *Kerr* was erroneous. Tex. Gov't Code Ann. § 22.001(a)(6) (Vernon 1986); Tex. R. App. P. 133(a).

All of this reveals there is persuasive evidence that the Texas Supreme Court would apply letter of credit law in the way the Fifth Circuit did and not as the *Kerr* court did. The subsequent publication of the *Kerr* opinion by the Amarillo court does not correct any error in that opinion. It was a flawed opinion when issued, it was a flawed opinion when the Texas Supreme Court denied the application for a writ of error, and it remains a flawed opinion. Under the circumstances, no purpose would be served in remanding the case for further proceedings in the light of *Kerr*, and the judgment below should be affirmed.

ARGUMENT

I. THE ISSUES RELATING TO UNPUBLISHED DECISIONS ARE MOOT

At the time the *Kerr* opinion was called to the attention of the Fifth Circuit, the Amarillo court had decided, pursuant to Rule 90(e) of the Texas Rules of Appellate Procedure, that the opinion should not be published and had therefore endorsed the words "Do not publish" at the foot of the opinion. J.A. 36. Such a designation carried with it certain consequences under Texas law. Specifically, the opinion was not to be cited as authority either by counsel or by a court, and was regarded by the Texas courts as being wholly without precedential value.

Berry v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986); Tex. R. App. P. 90(i).

A state is free to designate from among potentially available sources of law, those which it regards as forming a part of its jurisprudence and, in particular, a state need not accord precedential value to each and every decision rendered by its courts. *See, e.g.*, *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948). In fact, a substantial number of jurisdictions other than Texas do not accord precedential effect to "Do not publish" opinions.[7] The reasons for the wide-spread adoption of such rules are well known and have received extensive comment.[8] Moreover, under the rationale of *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), as elaborated in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), it is clear that federal courts sitting in diversity are required to follow state law with respect to such unpublished opinions, because the failure to do so would inevitably create two separate bodies of law, one in the state courts and the other in the federal courts. This, in turn, would lead to the very forum shopping and inequitable administration of the laws which *Erie* was intended to preclude.

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7 *See, e.g.*, 1st Cir. R. 36.2(b)(6); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2); 8th Cir. R. 8(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3; D.C. Cir. Rule 11(c); Fed Cir. R. 18(c); Ariz. R. Civ. App. P. 28; Ark. Sup. Ct. and Ct. App. R. 21; Cal. Ct. R. 976, 977; Colo. App. R. 35; D.C. Ct. App. R. 36, 28(h); Haw. R. App. P. 35; Ind. R. App. P. 15; Kan. Sup. Ct. R. 7.04; Ky. R. Civ. P. 76.28; La. Ct. App. R. 2-16.2, 2-16.3; Md. R. 1092; Mich. App. R. 7.215; Miss. Sup. Ct. R. 35; Nev. Sup. Ct. R. 123; N.J. Ct. R. 1:36-2, 1:36-3; N.M. R. App. P. 12-405; Okla. R. Civ. App. P. 1.200; Wis. R. App. P. 809.23.

8 *See generally* R. Posner, *The Federal Courts: Crisis and Reform* (1985); Nichols, *Selective Publication of Opinions: One Judge's View*, 35 Am. U.L. Rev. 909 (1982); Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1183 (1978); Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981); Note, *Unreported Decisions in the United States Courts of Appeals*, 63 Cornell L. Rev. 128 (1977).

When the Court granted certiorari in this case, issues concerning the use of such "Do not publish," non-precedential opinions were present. However, the *Kerr opinion, unpublished* at the time certiorari was granted, has become a published opinion by the direction of the Amarillo court. Exxon Supp. Br. 1. Hence, there is no case or controversy concerning *Kerr* as an unpublished opinion, and issues related thereto are moot. *See, e.g., Honig* v. *Doe*, 108 S. Ct. 592 (1988); *De Funis* v. *Odegaard*, 416 U.S. 312 (1974). The question now is whether any purpose would be served by the court below reconsidering its decision in light of the now-published *Kerr* opinion. We submit that there would not. The Fifth Circuit was clearly correct in its application of Texas law. The *Kerr* opinion provides no arguments that have not already been advanced in the Fifth Circuit. *Kerr* is flawed as authority because the Texas Supreme Court has held that there is error in the opinion, and belated publication does not correct such error.

II. THE FIFTH CIRCUIT'S DECISION IS CORRECT BASED ON TEXAS LAW AS ENUNCIATED BY THE TEXAS SUPREME COURT

This is a diversity case which was briefed and decided in the Fifth Circuit on the basis of Texas law. Under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), a federal court sitting in diversity is required to apply state law as enunciated by the highest court of the state in question. Where the highest court of the state has not spoken on a particular issue, the diversity court is required to predict what the highest court of the state would decide if the issue were presented to it:

> [When] the underlying substantive rule involved is based on state law the State's highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving "proper regard" to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.

Commissioner v. *Estate of Bosch*, 387 U.S. 456, 465 (1967); *see also Bernhardt* v. *Polygraphic Co. of Am.*, 350 U.S. 198 (1956); *King* v. *Order of United Commercial Travelers of Am.*, 333 U.S. 153 (1948).[9]

When a federal court is exercising its diversity jurisdiction:

> the federal judge need no longer be a ventriloquist's dummy. Instead he is free, just as his state counterpart is, to consider all the data the highest court of the state would use in an effort to determine how the highest court of the state would decide. This is as it should be. Unless this much freedom is allowed the federal judge, the Erie doctrine would simply have substituted one kind of forum-shopping for another.

C. Wright, *Law of Federal Courts* 373-74 (4th ed. 1983) (footnote omitted). Thus, under *Erie* a diversity court may consider decisions of intermediate appellate state courts but is not bound by them and, in fact, must disregard them if " '*convinced by other persuasive data that the highest court of the state would decide otherwise.*' " *Bosch*, 387 U.S. at 465 (quoting *West* v. *American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940)) (emphasis added in *Bosch*); *see also* 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507, at 86-91 (1982).

The Fifth Circuit comprehensively evaluated and applied Texas law to resolve the issues presented to it. Throughout its opinion the court below specifically relied upon many Texas statutory and case authorities, and the fact that the court did not always cite a Texas authority and sometimes cited a non-Texas authority such as a treatise, does not in any way derogate from the fact that its decision was based on principles of Texas

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9 The cases relied on by Exxon to establish the effect a diversity court must give to state intermediate appellate court decisions (Exxon Br. 16) do not reflect this Court's more current authority, such as *Bosch*, which Exxon fails even to cite. The more recent decisions of this Court, cited in the text, have clearly shifted away from emphasizing a mechanical application of lower court decisions.

law—not on "general commercial law." The *Kerr* opinion, however, stands in startling contrast to Texas letter of credit law and ignores the well-established legal principles governing letters of credit that have been developed by the Texas Supreme Court.

In the past ten years, the Texas Supreme Court has issued five decisions which substantively deal with letters of credit. *CKB & Assocs., Inc.* v. *Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653 (Tex. 1987); *Fina Supply, Inc.* v. *Abilene Nat'l Bank*, 726 S.W.2d 537 (Tex. 1987); *Westwind Exploration, Inc.* v. *Homestate Savs. Ass'n*, 696 S.W.2d 378 (Tex. 1985); *Temple-Eastex, Inc.* v. *Addison Bank*, 672 S.W.2d 793 (Tex. 1984); *Republic Nat'l Bank* v. *Northwest Nat'l Bank*, 578 S.W.2d 109 (Tex. 1979). The opinion below is fully in accord with the broad panoply of legal principles governing letters of credit announced in those cases; by contrast, these principles are wholly absent from *Kerr*.[10]

For example, the Fifth Circuit recognized that letters of credit in Texas are subject to, and must comply with, Texas statutory provisions, including the Texas Business and Commercial Code. J.A. 67, 70, 71, 74. The court thereby adhered to the dictates of the Texas Supreme Court that "Chapter 5 of the Uniform Commercial Code governs letters of credit." *Temple-Eastex*, 672 S.W.2d at 797; *see also Fina*, 726 S.W.2d at 542; *Westwind*, 696 S.W.2d at 381; *Republic Nat'l Bank*, 578 S.W.2d at 112-13. Indeed, every statute used by the Fifth Circuit in its opinion was a Texas statute. By contrast, however, the *Kerr* court failed to apply, or even acknowledge the exist-

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10 Although Exxon chides the court below for allegedly not applying principles of Texas letter of credit law, Exxon itself never cites to this Court, much less discusses, *three* of the principal and most recent letter of credit decisions of the Texas Supreme Court—*Fina*, *Westwind* and *CKB & Assocs.* Similarly, the Amarillo court in *Kerr* fails even to make a reference to *Fina*, *Republic Nat'l Bank* or *CKB & Assocs.* (J.A. 29-36) and, while noting the Plains National Bank's reliance on *Westwind*, fails substantively to distinguish or otherwise deal with the case. *See* J.A. 34.

ence of, the Texas statutory provisions dealing with letters of credit. J.A. 29-36.

The Fifth Circuit recognized that the issuer of a letter of credit "has no obligation to pay unless the beneficiary strictly complies with the conditions contained in the credit." J.A. 71. The court thereby adhered to the Texas law that a beneficiary who "fail[s] to strictly comply with the terms and conditions of the letter of credit [is] not entitled to receive payment under it." *Fina*, 726 S.W.2d at 542; *see also Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 795.[11] By contrast, the *Kerr* court fails to apply or even note the Texas rule requiring strict compliance with letter of credit terms. J.A. 29-36.

The Fifth Circuit's decision below is fully in accord with Texas law that the "issuer of [a] letter of credit incurs no liability on demands for payment presented after expiration date." *Temple-Eastex*, 672 S.W.2d at 795; *see also Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Siderius, Inc.*, 583 S.W.2d at 860. The *Kerr* court, however, failed to acknowledge that the Texas Supreme Court requires payment documents under a letter of credit to be presented before the expiry date. J.A. 29-36.

The Fifth Circuit also followed Texas statutory and common law by refusing to modify the terms of, or change, the letter of credit without a finding that *each* of the three parties to the letter of credit transaction (*i.e.*, the bank, the beneficiary and the

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11 Other Texas cases, such as *Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 862 (Tex. Civ. App.—Tyler 1979, no writ), and *BA Commercial Corp.* v. *Hynutek, Inc.*, 705 S.W.2d 713, 715 (Tex. App.—Dallas 1986, no writ), are to the same effect. Indeed, *BA Commercial*, although relied on by Exxon (Exxon Br. 5, 19), actually supports Paribas' position in this case. *BA Commercial* dealt with a letter of guarantee, *not* a letter of credit, and the court made a specific point of distinguishing the two. *See* 705 S.W.2d at 715. Furthermore, the court indicated that, had the letter of guaranty been a letter of credit, there could *not* have been any recovery under it because the beneficiary had failed to strictly comply with the terms of the instrument—even though the beneficiary could not have done so. *Id.* at 715-16.

account party) agreed to the modifications. J.A. 73-75. Texas law on this subject, as expressed by the Texas Supreme Court, could not be any clearer: "[O]nce established, an irrevocable [letter of] credit can be modified by the issuer only with the consent of the beneficiary and the account party." *Fina*, 726 S.W.2d at 541-42; *see also* Tex. Bus. & Com. Code Ann. § 5.106(b) (Vernon 1968). In *Kerr*, however, the court modified the letter of credit over the express objection of the issuer.

The Fifth Circuit recognized (J.A. 71) the Texas principle that an issuer of a letter of credit appropriately insists upon receiving documents that strictly conform to the requirements of the instrument because an issuer who pays against nonconforming documents loses its right to reimbursement from the account party. *See, e.g.*, *Fina*, 726 S.W.2d at 542; Tex. Bus. & Com. Code Ann. § 5.114(c) (Vernon 1968). The *Kerr* opinion nowhere explains how a bank which pays a letter of credit presented after the expiry date specified in the letter of credit can obtain reimbursement from the bank's customer.

The Fifth Circuit recognized (J.A. 72) the Texas principle that a standby letter of credit is regarded as an extension of credit by the bank to the account party and therefore is subject to the statutory and regulatory loan limits imposed upon lending institutions. *See, e.g.*, *Republic Nat'l Bank*, 578 S.W.2d at 114. For this reason, among others, it is imperative for a bank to know with certainty when its obligation is at an end. Significantly, the *Kerr* court—like the district court in this case—made no attempt to specify any new or revised expiry date for termination of the bank's obligation. Nor did *Kerr* or the district court here suggest any way in which a bank can determine, short of years of litigation, when its obligation under an expired letter of credit ceases if the stated expiry date is not given effect.

The Fifth Circuit recognized (J.A. 67-75) that Texas courts routinely look to, and rely on, letter of credit decisions and authorities from jurisdictions outside Texas in resolving issues of Texas letter of credit law, inasmuch as the statutory laws governing letters of credit (*i.e.*, Article 5 of the Uniform Commercial Code) are essentially the same throughout the United

States. *See, e.g., CKB & Assocs.*, 734 S.W.2d at 655; *Westwind*, 696 S.W.2d at 381; *Temple-Eastex*, 672 S.W.2d at 797; *Republic Nat'l Bank*, 578 S.W.2d at 112-16; *Cypress Bank*, 610 S.W.2d at 187; *Siderius*, 583 S.W.2d at 859-62. *Kerr*, however, makes no reference to the cases from other jurisdictions—including cases used approvingly by Texas courts—which have uniformly held that the impossibility of compliance with conditions of a letter of credit prior to its expiry date is not grounds for ignoring or changing that date. *See Liberty Nat'l Bank & Trust Co.* v. *Bank of Am. Nat'l Trust & Savs. Ass'n*, 218 F.2d 831, 840-41 (10th Cir. 1955), *cited with approval in Siderius, Inc.* v. *Wallace Co.*, 583 S.W.2d 852, 860 (Tex. Civ. App.—Tyler 1979, no writ); *Hyland Hills Metro. Park & Recreational Dist.* v. *McCoy Enters., Inc.*, 554 P.2d 708 (Colo. Ct. App. 1976), *cited with approval in Cypress Bank* v. *Southwestern Bell Tel. Co.*, 610 S.W.2d 185, 187 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).[12]

The Fifth Circuit recognized (J.A. 65, 72) the Texas principle that clarity and certainty in letter of credit transactions are particularly important because the utility of letters of credit lies in the assurance that payment will be made upon compliance with the specified terms without delay or litigation. *See, e.g., CKB & Assocs.*, 734 S.W.2d at 655; *Fina*, 726 S.W.2d at 541 ("[A] bank must be able to predict with certainty the possible range of its liability and must be assured that the scope of this liability will not be altered."); *Republic Nat'l Bank*, 578 S.W.2d at 115. By contrast, *Kerr* affirmatively creates just such uncertainty and unpredictability in these vital matters.

Judicial reformation of the letter of credit in this case, where there is no fraud, scrivener's error or mutual mistake, is without justification under Texas law.[13] *See, e.g., Fina*, 726 S.W.2d

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12 *See also Insurance Co. of N. Am.* v. *Heritage Bank, N.A.*, 595 F.2d 171, 173-76 (3d Cir. 1979); *AMF Head Sports Wear, Inc.* v. *Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978).

13 It may well be that *Kerr* itself involved a mutual mistake because one of the few cases upon which the *Kerr* court based its decision was a mutual mistake case. *See Osburn* v. *Smart*, 58 S.W.2d 1073 (Tex. Civ. App.—Fort Worth 1932, writ dism'd); J.A. 33.

at 541; *Champlin Oil & Ref. Co.* v. *Chastain*, 403 S.W.2d 376, 382-83 (Tex. 1966); *Continental Oil Co.* v. *Doornbos*, 402 S.W.2d 879, 883 (Tex. 1966). Provisions in a document do not always have to be reconciled if to do so would impose obligations which were not agreed to by one of the parties. In such a case, "it inevitably follows that the alleged contract should have been held void for uncertainty." *United States* v. *Ellicott*, 223 U.S. 524, 541 (1912). This is also a long-standing rule in Texas:

> If the language used admits of but one meaning, and the different clauses of a written instrument are plainly contradictory, they mutually destroy each other and render the instrument void.

Thompson v. *Waits*, 159 S.W. 82, 84 (Tex. Civ. App.—Austin 1913); *see also Milam Bldg. Co.* v. *Dannelley*, 57 S.W.2d 345, 347 (Tex. Civ. App.—Waco 1933).

Unlike the *Kerr* court, whose fundamental error was the failure to apply Texas letter of credit principles to its decision, the Fifth Circuit overlaid all of the principles of Texas letter of credit law on the fact pattern of the dispute between Paribas and Exxon. The court below concluded that Paribas' conduct was entirely consistent with its obligations as the issuer—the bank accurately conveyed to Exxon the language provided by Houston for the letter of credit terms, and Paribas twice made sure that the facially conflicting language requested by Houston was in fact exactly what Houston wanted.[14] Having twice received confirmation that this was exactly how Houston wanted the letter of credit to read, Paribas is entitled, under Texas letter of credit law, to the assurance "that the scope of [its] liability will not be altered." *Fina*, 726 S.W.2d at 541.

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14 In these circumstances, Exxon's contention that the letter of credit should be construed against Paribas because it was the author (*see* Exxon Br. 5, 18) has no application to this case because Houston, not Paribas, provided the essential language used in the letter of credit. *Compare* App. 7A *with* J.A. 8-9.

III. THE TEXAS SUPREME COURT HAS CONFIRMED THAT THERE IS ERROR IN THE *KERR* OPINION

Exxon incorrectly contends that the Texas Supreme Court "denied review" of the *Kerr* case and that a diversity court is therefore bound by the *Kerr* opinion. Exxon Br. 19-20. Exxon's premise is that by "denying review" the Texas Supreme Court somehow endorsed the *Kerr* opinion. The opposite is true, however. What the Texas Supreme Court actually did was to deny an application for a writ of error, and such "writ denied" action means that the Texas Supreme Court found that the *Kerr* opinion contained one or more errors of law.

The appellate jurisdiction of the Texas Supreme Court contained in section 22.001(a)(6) of the Texas Government Code was amended in 1987 to give that court discretionary, instead of obligatory, review power where the lower court committed reversible error.[15] *See* Carlson & Garcia, *The New Discretionary Review Powers of the Texas Supreme Court*, 1987 Tex. B.J. 1201, 1202 (Dec. 1987). The amendment permits the Texas Supreme Court to decline review of an erroneous decision unless the error "is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction" (excluding cases where the jurisdiction of the court of appeals is final by statute). App. 2A; *see also* Carlson & Garcia, *supra*. Under this subdivision, the Texas Supreme Court could find errors of law—even reversible errors—in a court of appeals decision, but decline to take the case on appeal because the errors were regarded as not being of such importance to the jurisprudence of the state as to require correction.

Where an application for a writ of error reveals that the judgment appealed from is correct and that the principles of law in the court of appeals' opinion were correctly determined, the application is "refused". By contrast, where an application for a writ of error reveals that the opinion appealed from is, in

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15 The other five subdivisions of section 22.001(a), reprinted in the Appendix at 2A, involve aspects of the appellate jurisdiction of the Texas Supreme Court not relevant here.

some respect erroneous, but the Texas Supreme Court does not wish to exercise its discretionary power to review, the application is "denied". Tex. R. App. P. 133(a); Tex. Gov't Code Ann. § 22.001(a)(6) (Vernon 1986); Carlson & Garcia, *supra* p. 20; App. 2A, 5A.

Significantly, the Texas Supreme Court in *Kerr* did not "refuse" the application for a writ of error. The court, therefore, did *not* find that the judgment of the Amarillo court was correct and that the legal principles on which it was based were correctly determined. Instead, the "writ denied" determination in *Kerr* reveals that the Texas Supreme Court found the opinion of the Amarillo court to be erroneous but that, as the Texas Supreme Court stated in its April 27, 1988 order, the error was not "of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals." App. 13A.

When the Texas Supreme Court acted, the *Kerr* opinion was not a part of the jurisprudence of the State of Texas because it was unpublished. J.A. 36; *Berry* v. *Berry*, 647 S.W.2d 945 (Tex. 1983); *Wheeler* v. *Aldama-Luebbert*, 707 S.W.2d 213 (Tex. App.—Houston 1986). By definition, an error—even a reversible error—in an opinion which is not a part of the jurisprudence of Texas cannot have any importance to the jurisprudence of Texas. As noted in Carlson & Garcia, *supra* p. 20, at 1203-04 (footnotes omitted):

> Under [Texas' new discretionary review] system an unpublished opinion adds to the justification for refusing to grant the application for review.
>
> If one defines "jurisprudence" as a "body of law" it is doubtful that an unpublished opinion could impact that law except of course as between the immediate litigants. Rule 133(a) as amended no longer focuses upon error in the judgment which affects the immediate parties. Furthermore, an unpublished opinion cannot be used as authority by the bench or bar. Thus, an unpublished opinion has no *stare decisis* value.

Indeed, the Texas Supreme Court punctuated the conclusion that the unpublished *Kerr* opinion has no importance to the jurisprudence of Texas when, on April 27, 1988, simultaneously with the denial of the application for a writ of error, the Texas Supreme Court also refused to order publication of the *Kerr* opinion. App. 13A. The court thereby affirmatively kept the *Kerr* opinion out of the jurisprudence of Texas. *See, e.g., Berry*, 647 S.W.2d at 947.

IV. LATE PUBLICATION OF THE *KERR* OPINION DOES NOT INVALIDATE THE FIFTH CIRCUIT'S DECISION

The Amarillo court's decision to publish *Kerr*—made over two months after the Texas Supreme Court found the opinion to be erroneous—obviously does not correct the errors in the opinion. However, publishing the opinion does serve to focus attention on the all-out campaign waged by Exxon to try to get the *Kerr* opinion published after the fact to influence this Court's decision. Indeed, the jurisprudential vice of just such activity was noted by Judge Posner in his analysis of the federal courts:

> One aspect of the current nonpublication practice deserves more critical attention than it has received: the practice of routinely granting requests to publish unpublished opinions. It is questionable not only because it can lead to publication of substandard opinions but also because it can lead to bias in the creation of precedents. Institutions with recurrent litigation in particular areas—government agencies, insurance companies, railroads, and so forth—sometimes find it worth their while to review unpublished opinions systematically and request publication of those that favor their litigation interests. Unless their opponents are also repeat litigants with an interest in precedent, an unrepresentative sample of unpublished opinions will be given precedential status through publica-

> tion, and the weight of precedent in particular areas will be distorted.

R. Posner, *supra* p. 12 n.8, at 126.

Even as a published opinion, *Kerr* does not require any contrary result from that rendered by the court below. Apart from the fact that *Kerr* is not in accord with current Texas Supreme Court doctrine on letters of credit, the *Kerr* case lacks features which make the present case unique. The *Kerr* opinion does not suggest that the beneficiary of the letter of credit, like Exxon, noted the expiry date and payment conditions when the letter of credit was first delivered and acknowledged in writing that the credit would expire on the date set forth in the letter of credit. There is no indication in *Kerr* that the issuer, like Paribas, confirmed on two occasions with its customer that the expiry date stated in the credit was the one intended by the customer. And *Kerr* does not indicate that the beneficiary, like Exxon, may have been relying on things other than the letter of credit for security.

The fact remains that the *Kerr* opinion was a flawed opinion when it was issued, it was a flawed opinion when the Texas Supreme Court acted in April 1988, it was declared by the Texas Supreme Court to be a flawed opinion, and it is still a flawed opinion. Subsequent publication of an opinion that the Texas Supreme Court has said is wrong neither makes the opinion correct nor requires that diversity courts follow it.

V. THERE IS NO BASIS FOR CERTIFICATION TO THE TEXAS SUPREME COURT

Exxon's suggestion (Exxon Br. 46) that this Court consider certification to the Texas Supreme Court, based on Exxon's claim that the Fifth Circuit's decision did not "acknowledge the primacy of [Texas] state law" and "exhibited an unwillingness to undertake the deep, patient, and probing analysis of state law that *Erie* requires" is specious. Exxon's implication that the Fifth Circuit is not to be trusted to apply Texas law and that this

Court should preempt the Fifth Circuit by itself certifying an issue of state law to the Texas Supreme Court is wholly unjustified. As demonstrated above, the Fifth Circuit's decision was squarely based on Texas law, exhibited none of the reluctance to examine Texas law which Exxon attributes to it, and was palpably correct.

CONCLUSION

For each of the reasons assigned, the judgment below was correct and should be affirmed.

Respectfully submitted,

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APPENDICES

APPENDIX 1

Supplement to Appendix 1 of Respondent's Brief in Opposition Relating to the Parent, Principal Affiliates and Non-Wholly-Owned Subsidiaries of
BANQUE PARIBAS
(formerly called Banque de Paris et des Pays-Bas)

Principal Affiliates and Subsidiaries Not Wholly-Owned:

Delete:
Banque Paribas Sverige
C.G.I.B. Banque pour la Reconstruction et l'Equipement
"Cimopar" Compagnie d'Investissements Movoliers de Paribas
C.K.S. France
CN Industries
Compagnie Arabe de Financement International
Intec Systems, Inc.
Omnium de Participations Bancaires Paribas "OPB-Paribas"
Omnium de Participations Financieres et Industrielles de Paribas "Opfi-Paribas"
Opafi
OTH
S.A.I.C. Velcorex

Add:
Cap Groupe PLT
Courcoux Bouvet
ETKC
GB Inno B.M.
Laiteries Emile Bridel
Nouvene Cofimer
Opatra
Paribas Participations S.A.
Paribas U.S.A.
Teleplastics Industries

APPENDIX 2

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

* * *

§ 22.001. Jurisdiction

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appeals from appealable judgment of the trial courts:

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

(b) A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court either by writ

of error or by certificate from the court of appeals, but the court of appeals may certify a question of law arising in any of those cases at any time it chooses, either before or after the decision of the case in that court.

(c) An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state. It is the duty of the supreme court to prescribe the necessary rules of procedure to be followed in perfecting the appeal.

(d) The supreme court has the power, on affidavit or otherwise, as the court may determine, to ascertain the matters of fact that are necessary to the proper exercise of its jurisdiction.

* * *

Rule 90. Opinions, Publication and Citation

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissenting from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court, Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished opinions shall not be cited as authority by counsel or by a court.

* * *

Rule 133. Orders on Applications for Writ of Error

(a) Notation on Denial of Application. In all cases where the judgment of the court of appeals is correct and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court will refuse the application with the docket notation "Refused." In all cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error of law which requires reversal or which is of such importance to the jurisprudence of the State as to require correction, the court will deny the application with the notation "Writ Denied." In all cases where the Supreme Court is without jurisdiction of the case as presented in the application, it will dismiss the application with the docket notation "Dismissed for Want of Jurisdiction."

(b) Conflict in Decisions. In cases of conflict named in subsection (a)(2) of section 22.001 of the Government Code, the Supreme Court will grant the application for writ of error, unless it is in agreement with the decision of the court of appeals in the case in which the application is filed. In that event said Supreme Court will so state in its order, with such explanatory remarks as may be deemed appropriate. If the decision of the court of appeals is in conflict with an opinion of the Supreme Court, is contrary to the Constitution, the statutes or any rules promulgated by the Supreme Court, the Supreme Court may, upon granting writ of error and without hearing argument in the case, reverse, reform or modify the judgment of the court of appeals, making, at the same time, such further orders as may be appropriate.

(c) Moot Cases. If a cause or an appealable portion thereof is moot, the Supreme Court may, in its discretion and after notice to the parties, upon granting writ of error and without hearing argument with reference thereto, dismiss such

cause or the appealable portion thereof without reference to the merits of the appeal.

* * *

§ 5.106. Time and Effect of Establishment of Credit

(a) Unless otherwise agreed a credit is established

(1) as regards the customer as soon as a letter of credit is sent to him or the letter of credit or an authorized written advice of its issuance is sent to the beneficiary; and

(2) as regards the beneficiary when he receives a letter of credit or an authorized written advice of its issuance.

(b) Unless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.

(c) Unless otherwise agreed after a revocable credit is established it may be modified or revoked by the issuer without notice to or consent from the customer or beneficiary.

(d) Notwithstanding any modification or revocation of a revocable credit any person authorized to honor or negotiate under the terms of the original credit is entitled to reimbursement for or honor of any draft or demand for payment duly honored or negotiated before receipt of notice of the modification or revocation and the issuer in turn is entitled to reimbursement from its customer.

APPLICATION FOR COMMERCIAL CREDIT

TO: **Banque de Paris et des Pays-Bas**

400 PARK AVENUE
NEW YORK, N. Y. 10022

IRREVOCABLE CREDIT NO. 711828FT

DATE July 9, 1981

REFERENCE: Hal Peist

[redacted] (DETAILS)

PLEASE ISSUE FOR OUR ACCOUNT AN **IRREVOCABLE CREDIT** AND ADVISE BY ☐ CABLE IN BRIEF, FULL DETAILS BY MAIL ☐ AIRMAIL

THE ACCOUNT OF HOUSTON OIL & REFINING, INC.

IN FAVOR OF Exxon Company, U.S.A.

ADDRESS 800 Bell, Room 3593 Houston, Texas 77001 [redacted]

FOR AN AMOUNT OF U.S. $19,530,000.00 ABOUT / MAXIMUM / MORE OR LESS %

AVAILABLE AT ___ AT SIGHT / ___ DAYS SIGHT / BY DRAFT DRAWN ON Not prior to 8/20/81 AT ___ DAYS FROM

AGAINST THE FOLLOWING DOCUMENTS

(1) ☒ COMMERCIAL INVOICE IN 3 COPIES ~~[illegible]~~ covering approximately 18,000 B/D South Louisiana Light Crude Oil delivered pipeline facilities St. James, La. during July, 1981

☐ EX. WORKS ☐ F.A.S. ☐ F.O.B. ☐ C&F ☐ C.I.F. ☐ OTHER

☐ INSURANCE POLICY/CERTIFICATE ISSUED BY AN INSURANCE COMPANY IN NEGOTIABLE FORM COVERING FOR PAYABLE IN

☐ MARINE AND WAR RISK INSURANCE COVERED BY US.

(2) ☒ SHIPPING DOCUMENTS Copies of pipeline tickets or transfer statement evidencing delivery and/or transfer of crude oil from Exxon Company, U.S.A. to Houston Oil & Refining, Inc.

(3) ☒ Statement signed by an authorized representative certifying that Houston Oil & Refining, I has failed to deliver to Exxon Company, U.S.A.558,000 barrels of one of the following: ☐ ~~OTHER DOCUMENTS~~ South Louisisana to St. James, La., West Texas Sour to Shell, McCamey or Exxon, Crane, Arab Light to U.S. Gulf Coast or Alaskan North Slope to U.S. Gulf Coast.between September and December, 1981.

(4) ☒ EXPIRATION DATE October 31, 1981.

SHIPMENT FROM ___ TO ___

SHIPMENT LATEST ___

PARTIAL SHIPMENTS ☐ PERMITTED ☐ NOT PERMITTED

TRANSHIPMENT ☐ PERMITTED ☐ NOT PERMITTED

THIS LETTER OF CREDIT IS NOT TO BE AVAILABLE AFTER EXPIRATION. PLEASE ADVISE CONFIRM IT THROUGH ___

SPECIAL INSTRUCTIONS Receivable: Ashland 526S, Sohio 220S

THE OPENING OF THIS CREDIT IS SUBJECT TO THE TERMS AND CONDITIONS AS SET FORTH IN THE COMMERCIAL LETTER OF CREDIT AGREEMENT APPEARING ON THE REVERSE HEREOF TO WHICH WE AGREE OR IF OUR CONTINUING AGREEMENT IS LODGED WITH YOU. SUBJECT TO THE TERMS AND PROVISIONS SET FORTH THEREIN

AUTHORIZED SIGNATURES

HOUSTON OIL & REFINING, INC.

TELEPHONE NO. ___

DEFENDANT'S EXHIBIT 2

BEST AVAILABLE COPY

APPENDIX 3 7A

400 PARK AVENUE
NEW YORK, N.Y. 10022

1. In consideration of your issuing, at the request of the undersigned (or, if more than one, of any one or more of the undersigned), your Commercial Letter of Credit (hereinafter called the "Credit"), we jointly and severally hereby unconditionally agree as follows:

2. As to drafts, acceptances or other instruments or demands under or purporting to be under the Credit which are payable in United States Currency, we agree: (a) in the case of each sight draft, instrument or demand, to reimburse you, at your office, on demand, the amount paid on such draft, instrument or demand, or, if so demanded by you, to pay to you at your office in advance the amount required to pay such draft, instrument or demand, and (b) in the case of each acceptance, to pay to you, at your office, the amount thereof, on demand but in any event not later than one business day prior to maturity, or, in case the acceptance is not payable at your office then on demand but in any event in time to reach the place of payment in the course of the mails not later than one business day prior to maturity.

3. As to drafts, acceptances or other instruments or demands under or purporting to be under the Credit, which are payable in currency other than United States Currency, we agree: (a) in the case of each sight draft, instrument or demand, to reimburse you, at your office, on demand, the equivalent of the amount paid, at the rate of exchange then current in New York for cable transfers to the place of payment in the currency in which such draft or instrument is drawn or the demand is made, or if there be no such rate at said time, then at such rate as you may fix; and (b) in the case of each acceptance, to furnish you, at your office, on demand, but in any event in time to reach the place of payment in the course of the mails not later than one business day prior to maturity, with first class bankers' demand bills of exchange to be approved by you for the amount of the acceptance, payable in the currency of the acceptance, and bearing our endorsement, or, if you so request, to pay to you, at your office, on demand, the equivalent of the acceptance at the rate of exchange current in New York for cable transfers at time of transmission to the place of payment in the currency in which the acceptance is payable, or if there be no such rate at said time, then at such rate as you may fix.

4. In the event that any United States Currency drafts are drawn by us or any of us on you in order to refinance any obligation set forth in the preceding two sections, and such drafts, at your option, are accepted by you, we agree to pay you on demand, but in any event not later than the maturity date, the amount of each such acceptance, and this agreement shall be applicable to all drafts so accepted by you as if such drafts were drawn under the Credit. Each amount which may become due and payable to you under this agreement may, in your discretion and if not otherwise paid, be charged by you to any available funds then held by you for our account.

5. We also agree to pay you, on demand, a commission and all charges and expenses paid or incurred by you in connection with the Credit and this agreement, and interest where chargeable. Said commission and interest shall be at such rates as may be established by you.

6. As security for any and all of our obligations and liabilities hereunder and also for any and all other of our obligations and liabilities (or the obligations or liabilities of any of us) to you, however created, arising or evidenced, whether joint or several, direct or indirect, absolute or contingent, or now or hereafter existing, or due or to become due (hereinafter called the "Liabilities"), we hereby grant to you a security interest in, and recognize and admit your ownership in and unqualified right to, the possession and disposal of all property shipped under or pursuant to or in connection with the Credit or in any way relative thereto, and to any of the drafts, instruments or demands drawn or made thereunder, and also in and to any and all shipping documents, warehouse receipts, policies or certificates of insurance and other documents accompanying or relative to drafts drawn or made under the Credit, (whether or not such goods, documents, or other property be released to us, or upon our order, on trust or bailee receipt or otherwise under any instrument whereby you retain a security interest), and in and to the proceeds of each and all of the foregoing, until such time as all the Liabilities have been fully paid and discharged. All such goods, instruments, documents and other property hereinabove referred to, together with any and all other property in which you are granted a security interest by us (or any of us) hereunder or under any other instrument, are hereinafter collectively referred to as the "Collateral". All or any of the Collateral coming into your possession or that of any of your correspondents may be dealt with, held, and disposed of by you as hereinafter provided; and receipt by you, or any of your correspondents at any time, of other security, including cash, shall not be deemed a waiver of any of your rights and powers herein mentioned. In the event that you deliver to us any of such property or the documents of title thereto prior to your having received reimbursement with respect to the relative drafts or acceptances as herein provided, we agree to execute and deliver to you trust receipts or other security instruments and statements of financing complying with the requirements of the applicable law, in such form as may be required by you, and to pay all filing fees in connection therewith, it being understood that your rights as specified herein or therein shall be in addition to, and not in limitation of, your rights under any applicable law.

7. In the event you receive some but not all of the documents against which drawings, by whatsoever method, may be made and, at our request, you deliver such documents to us, against trust receipt or otherwise, prior to the presentation of the relative draft, we agree to pay you on demand the amount of any claim made against you by reason thereof and authorize you to pay or accept (as the case may be) such draft when it is presented regardless of whether or not such draft or any document which may accompany it complies with the terms of the Credit.

8. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that you and any of your correspondents may receive and accept as "bills of lading" under the Credit, any documents issued or purporting to be issued by or on behalf of any carrier which acknowledge receipt of property for transportation, whatever the specific provisions of such documents, and that the on board date of each such document shall be deemed the date of shipment of the property mentioned therein, and that you may receive and accept as documents of insurance either insurance policies or insurance certificates. You may receive and accept as sufficient and controlling the description of the property contained in the invoice, and may receive and accept bills of lading, insurance and other documents, however variant in description from that contained in the invoice. You and any of your correspondents may receive and accept bills of lading containing stamped, written or typewritten provisions thereon, whether or not signed or initialed, and you and any of your correspondents may assume conclusively that the same were placed with authority on the bill of lading at the time of its signing and issuance by the steamship company or carrier or any agent thereof. You and any of your correspondents may accept documents of any character which comply with the provisions, definitions, interpretations and practices contained in the "Uniform Customs and Practice for Commercial Documentary Credits fixed by the International Chamber of Commerce", and any amendments thereto, or which comply with the laws or regulations in force in, or the customs or usages of, the place of shipment or negotiation.

9. Except insofar as instructions have been heretofore given by us in writing expressly to the contrary, we agree that part shipments may be made under the Credit and you may honor the relative drafts, instruments or demands. We agree that you and any of your correspondents may accept or pay any draft dated on or before the expiration of any time limit expressed in the Credit, regardless of when drawn and whether or when negotiated, provided the other required documents are dated on or prior to the expiration date of the Credit.

10. In the event of any increase in the amount of the Credit, or the extension (for one or more periods, whether or not longer than the original period) of the maturity or time for presentation of drafts, instruments, demands, acceptances or documents, or any other modification of the terms of the Credit at the request of any of us, with or without notice to the others of us, this agreement, and your rights hereunder, shall continue unimpaired and shall be binding upon us with respect to the Credit as increased, so extended or otherwise modified and with respect to any action taken by you or any of your correspondents in accordance with such extension, increase or other modification.

11. The users of the Credit shall be deemed our agents and we assume all risks of their acts and omissions. Neither you nor your correspondents shall be responsible for: the existence, character, quality, quantity, condition, packing, value, or delivery of the property purporting to be represented by documents; any difference in character, quality, quantity, condition, or value of the property from that expressed in documents; the validity, sufficiency, or genuineness of documents, even if such documents should in fact prove to be in any or all respects invalid, insufficient, fraudulent or forged; the time, place, manner or order in which shipment is made, partial or incomplete shipment, or failure or omission to ship any or all of the property referred to in the

[illegible] liability of any issuer, or for any other risk connected with insurance; any deviation from instructions, delay, default or fraud by the shipper or anyone else in connection with the property or the shipping thereof; the solvency, responsibility or relationship to the property of any party issuing any documents in connection with the property; delay in arrival or failure to arrive either the property or any of the documents relating thereto; delay in giving or failure to give notice of arrival or any other notice; any breach of contract between the shippers or vendors and ourselves or any of us; compliance with or circumstances resulting from any laws, customs or regulations which may be effective in countries of negotiation or payment of the Credit; failure of any draft, instrument or demand to bear any reference or adequate reference to the Credit, or failure of documents to accompany any draft, instrument or demand at negotiation, or failure of any person to note the amount of any draft, instrument or demand on the reverse of the Credit or to surrender or take up the Credit or to send forward documents apart from drafts, instruments or demands, as required by the terms of the Credit, each of which provisions, if contained in the Credit itself, it is agreed may be waived by you; errors, omissions, interruptions or delays in transmission or delivery of any messages, by mail, cable, telegraph, wireless or otherwise, whether or not they be in cipher; nor shall you be responsible for any act, error, neglect, or default, omission, insolvency or failure in the business of any of your correspondents or for any refusal by you or any of your correspondents to pay or honor drafts drawn under the Credit because of any applicable law, decree or edict, legal or illegal, of any governmental agency now or hereafter in force, or for any other matter beyond your control; and none of the above shall affect, impair or prevent the vesting of any of your rights or powers hereunder, or our obligations hereunder. Furtherance and extension and not in limitation of the specific provisions hereinbefore set forth, we agree that any action taken by you or by any of your correspondents under or in connection with the Credit or the relative drafts, instruments or demands, documents or property, if taken in good faith, shall be binding on us and shall not put you or your correspondents under any resulting liability to us; and we make like agreement as to any inaction or omission, unless in breach of good faith. We further agree that we will indemnify you and hold you harmless from and against each and every claim, demand, action or suit which may arise against you, or any of your correspondents, by reason of any action taken pursuant to this agreement.

12. We agree to procure promptly any necessary import and export and other licenses for the import or export or shipping of the property or payment therefor, and to comply with all foreign and domestic governmental regulations in regard to the shipment of the property or the finance thereof, and to furnish such certificates in that respect as you may at any time require, and to keep the property adequately covered by insurance satisfactory to you, in companies satisfactory to you, and to assign the policies or certificates of insurance to you, or to make the loss, if any, payable to you, at your option; and to furnish you if demanded with evidence of acceptance by the insurers of such assignment.

13. Each of us agrees at any time and from time to time, if you shall feel insecure, to deliver, convey, transfer, and assign to you, on demand, as security for any and all Liabilities, additional Collateral of a value and character satisfactory to you. Each of us agrees that all property belonging to us or any of us, or in which we or any of us may have an interest, of every kind and nature whatsoever, now or at any time hereafter delivered, conveyed, transferred, assigned or paid to you, or coming into your possession or into the possession of anyone for you in any manner whatsoever, whether expressly as security for any of the Liabilities, or for safe keeping or otherwise, and all items received for collection or transmission and the proceeds thereof, whether or not such property is in whole or in part released to us on trust or bailee receipt or otherwise under any instrument whereby you retain a security interest, are hereby pledged as security for Liabilities. Each of us agrees, with respect to himself, ourselves and any endorsers or guarantors of our obligations under this agreement, that upon the failure of any of us to perform any agreement herein contained or contained in any security instrument or other agreement delivered to you, or upon the default in the punctual payment of any sum due under the Credit, or upon failure at any time to keep a margin of security with you satisfactory to you, or upon the death of any of us, or upon the making by us or any of us of any assignment for the benefit of creditors, or upon the the filing of any voluntary or involuntary petition in bankruptcy or for arrangement or reorganization by or against us or any of us, or upon the application for the appointment of a receiver of any of the property of all or any of us, or upon any act of bankruptcy or state of insolvency of all or any of us, or if any governmental authority or any court at the instance of any governmental authority shall take possession of any substantial part of the property of all or any of us or shall assume control over the affairs or operations of all or any of us or if a receiver shall be appointed of, or if a writ or order of attachment or garnishment shall be issued or made against, the property or assets of all or any of us, or if, with respect to all or any of us, an application is made under Articles 51 and 52 of the New York Civil Practice Law and Rules by any judgment creditor for any order directing you to pay over money, or if suit, proceeding, or other action (at law or in equity) for the dissolution, reorganization, or liquidation is commenced, then all Liabilities shall become and be immediately due and payable without demand or notice, notwithstanding any credit or time allowed to us or any of us, or any instrument evidencing any such Liabilities, and each of us, as to property in which he may have any interest, and all of us, as to property in which we may have any interest, expressly authorize you, to the extent permitted by applicable law, in any such event, to sell immediately without demand for payment, without advertisement and without notice to us or any of us, all which are hereby expressly waived, any and all Collateral, arrived or to arrive, at private sale at public auction or at brokers' board or otherwise, at your option, in such parcel or parcels and at such time or times and at such place or places and for such price or prices and upon such terms and conditions as you may deem proper; and you are also given the right, power and authority, in your discretion, to collect or cause to be collected or otherwise to convert into money, all or any part of the Collateral, and you may, in your discretion, enforce the collection of the Collateral, with all additions thereto and substitutes therefor, by suit or otherwise, may surrender, compromise, release, renew, extend (for one or more periods, whether or not longer than the original period) or exchange any or all of the Collateral, and you may apply the net proceeds of such sale or sales, collection, exchange or conversion together with any balance of deposits and any sums credited by or due from you to us or any of us in general account or otherwise, to the payment of the costs, expenses and attorneys' fees incurred in respect of the Collateral, and the sale, collection, exchange or conversion thereof, and to the payment of any and all Liabilities. If any such sale be at brokers' board or at public auction you may purchase yourself, to the extent permitted by applicable law, be a purchaser at such sale, free from any right of redemption, which we and each of us hereby expressly waive and release. You are, however, released from all obligation or liability to collect any of the Collateral or to bind or charge any maker or endorser thereof.

14. The undersigned hereby certify and agree that no shipments will be made or other transactions undertaken under the Credit in violation of the laws of the United States or the regulations of any governmental agency.

15. You shall not be deemed to have waived any of your rights hereunder, unless you or your authorized agent shall have signed such waiver in writing. No such waiver, unless expressly stated therein, shall be effective as to any transaction which occurs subsequent to the date of such waiver, nor as to any continuance of a breach after such waiver.

16. The word "property" as used in this agreement includes goods, merchandise, securities, funds, choses in action, and any and all other forms of property, whether real, personal or mixed, and any right or interest therein.

17. If this agreement is signed by one individual, the terms "we," "our," "us," shall read throughout as "I," "the undersigned," "my," "me," as the case may be. If this agreement is signed by two or more parties, it shall be the joint and several agreement of such parties. Each of us shall be deemed to be the agent of all the others of us, and you, except to the extent expressly otherwise provided herein, act at the direction or request of any one or more of us, return or turn over the Collateral and any other property to any one or more of us, and give any notice or notices, whether or not required to be given, to any one or more of us, all as you may elect and without notice to any others of us.

This agreement is binding upon our heirs, legal representatives, successors and assigns.

This agreement has been made and delivered at New York, N. Y., and shall be governed by the Laws of the State of New York. The Credit shall be subject to the "Uniform Customs and Practice for Commercial Documentary Credits fixed by the International Chamber of Commerce except to the extent otherwise specifically set forth herein or therein. Wherever possible each provision of this agreement shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this agreement shall be prohibited by or invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without

BEST AVAILABLE COPY

APPENDIX 4

[SEAL OF THE STATE OF TEXAS]

Court of Appeals
Seventh District of Texas
Potter County Courts Building
501 Fillmore, Suite 2-A
Amarillo, Texas 79101

January 27, 1988

Mr. Kelly Bickerstaff
McCLESKEY HARRIGER BRAZILL & GRAF
P.O. Drawer 6170
Lubbock, Texas 79493

Re: Kerr Construction Company and the City of Lubbock v. The Plains National Bank of Lubbock, No. 07-86-0205-CV

Dear Mr. Bickerstaff:

In the above captioned cause, the Court this day overruled Appellee's Motion to Publish Opinion, of which you will please take due notice.

Very truly yours,

PEGGY CULP, CLERK

/s/ JoAnn Glover
JoAnn Glover, Deputy

bw

xc: Mr. Donald M. Hunt
CARR EVANS FOUTS & HUNT
P.O. Box 2585
Lubbock, Texas 79408

Mr. J. Worth Fullingim
City Attorney's Office
P.O. Box 2000
Lubbock, Texas 79457

APPENDIX 5

No. C-7185

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

THE PLAINS NATIONAL BANK OF LUBBOCK,

Petitioner

—v.—

KERR CONSTRUCTION COMPANY and THE CITY OF LUBBOCK,

Respondents.

MOTION TO PUBLISH

TO THE SUPREME COURT OF TEXAS:

Exxon Company, U.S.A. ("Exxon"), amicus curiae, files this motion requesting that, pursuant to Texas Rule of Appellate Procedure 90(h), this Court order publication of the decision of the Amarillo Court of Appeals.

Petitioner and the American Bankers Association, amicus curiae, rely heavily on the recent decision in *Exxon* v. *Banque de Paris et des Pays-Bas*, 828 F.2d 1121 (5th Cir. 1987), in which the Fifth Circuit Court of Appeals held that the expiry date in a letter of credit controls over all other inconsistent terms in a letter of credit even though that interpretation of the letter of credit rendered it impossible for Exxon, the beneficiary, to make the statement of default required in the letter of credit. The Fifth Circuit's opinion squarely conflicts with the rules of construction announced and consistently applied by

this Court and applied by the Amarillo Court of Appeals in this case.

After the time for filing a petition for rehearing had expired in Exxon's Fifth Circuit case, the Amarillo Court of Appeals handed down its unpublished opinion in this case. Sometime later Exxon became aware of the Court of Appeals' decision. Although a motion to publish was filed with the Amarillo Court of Appeals, that motion was denied. Based on the Amarillo Court of Appeals' opinion, Exxon moved in the Fifth Circuit to recall the mandate and for leave to file a second suggestion for reconsideration en banc. The Fifth Circuit denied Exxon's motions *solely* because the decision of the Amarillo Court of Appeals in this case is unpublished. Ex. A. The Fifth Circuit also refused to stay its decision in Exxon's case pending a final decision by this Court and further refused to certify the controlling question of Texas law in the diversity case to this Court.

The standards for publication, as expressed in Texas Rule of Appellate Procedure 90(c), are certainly met in this case. Indeed, the Court of Appeals' opinion should now be published because it meets three of the applicable four reasons for publication: (1) it applies an existing rule of law to a novel fact situation likely to recur in future cases; (2) it involves a legal issue of continuing public interest; and (3) it resolves a conflict of authority. *Id.* Any one of these reasons is a sufficient ground for publication.

Only by ordering publication of the Court of Appeals' opinion under Rule 90(h) can this Court ensure that the Fifth Circuit will correctly apply the law of Texas, a matter of vital interest to this Court and to the citizens of Texas. Furthermore, Exxon should not be denied the opportunity to have Texas law correctly applied in its diversity case merely because the Court of Appeals' opinion in this case is unpublished.

In light of the above, Exxon respectfully requests that this Court order that the Court of Appeals' opinion be published.

Respectfully submitted,

/s/ C. MARK BAKER

Rufus Wallingford
State Bar No. 20787000
C. Mark Baker
State Bar No. 01566010
Fulbright & Jaworski
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

Attorneys for Amicus Curiae
Exxon Company, U.S.A.

[Certificate of service and exhibits have not been reprinted]

APPENDIX 6

IN THE

SUPREME COURT OF TEXAS

April 27, 1988

No. C-7185,	)	
	)	
THE PLAINS NATIONAL BANK OF LUBBOCK	)	
	)	
	)	From LUBBOCK County,
vs.	)	Seventh District
	)	
KERR CONSTRUCTION COMPANY ET AL.	)	

Application of petitioner for writ of error to the Court of Appeals for the Seventh District, together with amicus curiae's, Exxon Company, U.S.A., motion to publish and motion to supplement the motion to publish and brief previously filed by amicus curiae Exxon Company, U.S.A., having been duly considered, it is ordered that said motion to supplement the motion to publish be granted, and that the motion to publish, as supplemented, be, and hereby is, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, The Plains National Bank of Lubbock, pay all costs incurred on this application.

APPENDIX 7

SUPREME COURT OF TEXAS

P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

May 25, 1988

Mr. George H. McCleskey
Mr. Kelly Bickerstaff
McCleskey, Harriger, Brazill
& Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. John C. Ross, Jr.
Lubbock City Attorney
P.O. Box 2000
Lubbock, TX 79457

Mr. James P. Brewster
Civil Trial Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. J. Worth Fullingim
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. Donald M. Hunt
Carr, Evans, Fouts & Hunt
P.O. Box 2585
Lubbock, TX 79408

Mr. Rufus Wallingford
Mr. C. Mark Baker
Fulbright & Jaworski
1301 McKinney Street
Houston, TX 77010

Mr. Luther M. Soules, III
Soules, Reed & Butts
800 Milam Building
San Antonio, TX 78205

Mr. John J. Grill
Mr. Michael F. Crotty
American Bankers Assn.
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

RE: Case No. C-7185

STYLE: THE PLAINS NATIONAL BANK OF LUBBOCK
v. KERR CONSTRUCTION COMPANY ET AL.

Dear Counsel:

Today, the Supreme Court of Texas dismissed for want of jurisdiction the motion for rehearing of motion to publish on behalf of amicus curiae, Exxon Company, U.S.A.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ PEGGY LITTLEFIELD
Peggy Littlefield, Chief Deputy

APPENDIX 8

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

June 1, 1988

Mr. George H. McCleskey
McCleskey, Harriger, Brazill & Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. Kelly Bickerstaff
McCleskey, Harriger, Brazill & Graf
P.O. Drawer 6170
Lubbock, TX 79493

Mr. John C. Ross, Jr.
Lubbock City Attorney
P.O. Box 2000
Lubbock, TX 79457

Mr. James P. Brewster
Civil Trial Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

Mr. J. Worth Fullingim
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, TX 79457

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RE: Case No. C-7185

STYLE: THE PLAINS NATIONAL BANK OF LUBBOCK
v. KERR CONSTRUCTION COMPANY ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/ illegible
Deputy

APPENDIX 9

[Cover page has not been reprinted]

No. 07-86-0205-CV

IN THE COURT OF APPEALS

FOR THE SEVENTH DISTRICT
AT AMARILLO, TEXAS

KERR CONSTRUCTION COMPANY AND THE CITY OF LUBBOCK,

APPELLANTS

—v.—

THE PLAINS NATIONAL BANK OF LUBBOCK,

APPELLEE

MOTION TO PUBLISH

TO THE COURT OF APPEALS:

Exxon Company, U.S.A. (Exxon), files this motion requesting that, pursuant to Texas Rule of Appellate Procedure 90(c), this Court order publication of the Amarillo Court of Appeals opinion previously rendered in this case.

Exxon appeared as an amicus curiae in support of this Court's opinion in the Supreme Court of Texas when The Plains National Bank applied for a writ of error in this case. At that time Exxon also asked that the Texas Supreme Court order the publication of this Court's opinion. However, the Texas Supreme Court has now denied the petitioners' application for writ of error and overruled its motion for rehearing. The Texas Supreme Court also dismissed Exxon's motion to publish for want of jurisdiction. Since the Texas Supreme Court has

decided it does not possess jurisdiction to order publication of this Court's opinion, Exxon now files its motion to publish in this Court as the Court properly possessing the jurisdiction to order publication of its previous rendered opinion.

Exxon believes that this Court should publish its opinion because the United States Supreme Court has granted Exxon's petition for a writ of *certiorari* to the Fifth Circuit in a case styled, *Exxon Co. U.S.A.* v. *Banque de Paris et des Pays-Bas* (Paribas), No. 87-1467 (*cert. granted* April 25, 1988), opinion below, 828 F.2d 1121 (5th Cir. 1987).

The facts and issues considered by this Court in *Kerr Construction* are virtually identical to those before the United States Supreme Court. In its petition for *certiorari*, Exxon contended that the Fifth Circuit wrongly refused to follow clear Texas precedent governing letters of credit. Exxon believes the opinion of the Amarillo Court of Appeals in *Kerr Construction* is the clearest, as well as the most recent expression of the Texas law governing letters of credit. The United States Supreme Court obviously agrees because that Court has granted *certiorari* on the following question:

> If after a federal court of appeals has entered judgment in a diversity case, but while the case remains *sub judice*, a state intermediate appellate court decides a controlling issue of state law in manner that conflicts with the judgment of the federal court, should the federal court vacate its judgment and reconsider in order to ensure adherence to applicable state law?

56 U.S.L.W. 3730.

Exxon's petition for *certiorari* was opposed by Paribas solely on the ground that the opinion of the Amarillo Court of Appeals in this case is unpublished. Unless this Court orders its opinion published, Paribas may escape application of the substantive law of Texas governing letters of credit simply because it removed Exxon's lawsuit to federal court. Until Exxon's petition for *certiorari* was granted on April 25, 1988, Paribas had successfully avoided the law of Texas because the Fifth Circuit refused to apply clear Texas precedent and instead applied its own notion of general commercial law.

Unless Exxon's motion to publish is granted, it will make it more difficult for the United States Supreme Court to correct the Fifth Circuit's refusal to apply controlling Texas precedent. Exxon submits that publication of the Amarillo Court of Appeals' decision under Rule 90 is the only way for this Court to insure that the substantive law of Texas governing letters of credit is applied in both the state and federal courts. After publication, the United States Supreme Court, under established *Erie* principles, will be able to instruct the Fifth Circuit to withdraw its opinion and act in conformity with the Amarillo Court of Appeals' opinion in *Kerr Construction*.

The standards for publication, as expressed in Texas Rule of Appellate Procedure 90(c), are certainly met in this case. Indeed, the Court of Appeals' opinion should now be published because: (1) it applies an existing rule of law to a novel fact situation; (2) it involves a legal issue of continuing public interest; (3) and it resolves a conflict of authority with a federal court applying Texas law while sitting in diversity. As the Court is aware, any one of these reasons is a sufficient ground for publication.

The correct application of Texas law in diversity cases is a matter of vital interest to this Court and to the citizens of Texas. It is imperative that the Texas law governing letters of credit be clearly announced and followed both in the state courts of Texas and in the Fifth Circuit. Exxon should not be denied the opportunity to have Texas law correctly applied in its diversity case merely because the Court of Appeals' opinion in this case remains unpublished.

In light of the recent action of the United States Supreme Court, Exxon respectfully requests that this Court order publication of its previously rendered opinion.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 87-1467

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

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IN THE

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OCTOBER TERM, 1988

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONER

I. PARIBAS HAS CONCEDED THE CENTRAL ISSUES OF FEDERAL DIVERSITY PRACTICE RAISED BY THIS CASE

The question presented in this case is whether a federal court sitting in diversity—here, either the Fifth Circuit or this Court—should consider and follow a relevant post-judgment state decision that has been brought to the federal court's attention while the diversity case is *sub judice*. In opposing certiorari, Paribas argued only that

the state decision, *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App. — Amarillo 1987, writ denied), could not properly be considered because it had not been ordered published. Br. in Opp. 3-5. Publication of that decision, however, has now been ordered (and the opinion is to be published at 753 S.W.2d 181). *See* Exxon Supp. Br. 1. As a consequence, Paribas no longer argues that this case should or even could be decided on the merits without reference to *Kerr Construction*.[1]

Major portions of this case therefore appear to have been resolved. Exxon's opening brief demonstrated that a court of appeals must reconsider its judgment in a diversity case in light of a new state decision brought to its attention prior to the expiration of time for filing a petition for certiorari. Exxon Br. 20-28. Exxon further showed that this Court, once it grants certiorari, has a duty to decide a diversity case in accordance with existing state law. *Id.* at 29-32. Paribas makes no argument to the contrary and thus concedes the central issues of federal diversity practice raised by this case.

Paribas in effect has entered a plea of confession and avoidance. Paribas implicitly acknowledges that *Kerr Construction* must be considered in deciding this case on the merits, but it argues that that decision should not be followed because (1) the Texas intermediate court of

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[1] Although Paribas formally acknowledges that the apparent complications introduced into the case by nonpublication of *Kerr Construction* have been removed, Paribas Br. 11-13, Paribas asserts, in a parting shot, that "it is clear" that diversity courts must follow state no-citation rules with respect to unpublished opinions. *Id.* at 12. That position, which already had been rejected by the First and Sixth Circuits, *see* Exxon Br. 37, has now been rejected by the Third Circuit as well. *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 n.6 (3d Cir. 1988).

appeals misapplied Texas law, Paribas Br. 13-19, and (2) the Texas Supreme Court has confirmed that the decision was erroneous. *Id.* at 20-22. This Court ordinarily does not address such arguments. When matters of state law are presented, the Court's usual practice is either to remand the case to the court of appeals or to certify the issue to the state supreme court.

The arguments under Texas law and practice advanced by Paribas, however, have two important implications for federal diversity practice. The first concerns the deference owing to a decision of a state intermediate appellate court that the state's highest court has deliberately let stand. The second concerns the appropriate standard to be used by a diversity court in determining state law when a state intermediate appellate court, but not the state supreme court, has decided a case squarely on point. Because these important issues of diversity practice are intertwined with the issues of Texas law raised by Paribas, this Court may deem it appropriate to consider and resolve both sets of issues itself.

II. ONCE, AS HERE, A STATE SUPREME COURT HAS EXERCISED ITS DISCRETION TO DENY REVIEW OF THE DECISION OF AN INTERMEDIATE APPELLATE COURT, THAT DECISION MUST BE FOLLOWED BY FEDERAL COURTS SITTING IN DIVERSITY

A. The Texas Supreme Court's Denial Of Review In *Kerr Construction* Did Not Constitute A Finding Of Error

Paribas argues that by denying the application for writ of error in *Kerr Construction* with the notation "writ denied," the Texas Supreme Court indicated that the decision "contained one or more errors of law." Paribas Br. 20. This completely misconceives the significance of the

notation "writ denied." That notation carries with it no suggestion that the decision of the intermediate court of appeals was erroneous. To the contrary, as is explained by the very authors on whom Paribas purports to rely, "writ denied" is precisely "analogous to a 'cert. denied' case in the United States Supreme Court indicating [that] discretionary review in the opinion of the court is not warranted." E. Carlson & R. Garcia, *The New Discretionary Review Powers of the Texas Supreme Court*, 1987 Tex. B.J. 1201, 1204 (Dec. 1987) (hereinafter cited as "Carlson & Garcia"). It is, of course, "well-settled . . . that denial of certiorari imparts no implication or inference concerning the Court's view of the merits." *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366 n.1 (1973).

Concerning this aspect of Texas appellate practice, it may truly be said that "a page [or so] of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Justice Robertson of the Texas Supreme Court laid out the relevant history two years ago in an article that called for and led to a major change in Texas law and practice. *See* T. Robertson & J. Paulsen, *Rethinking the Texas Writ of Error System*, 17 Texas Tech. L. Rev. 1 (1986) (hereinafter cited as "Robertson & Paulsen").

As Justice Robertson described in his article, the Texas Supreme Court had wholly mandatory appellate jurisdiction up until 1917; in that year, although mandatory jurisdiction was retained for certain categories of cases, the court's jurisdictional statute was amended to require the exercise of jurisdiction in most cases only where "it is made to appear that an error of law has been committed by the Court of Civil Appeals, *of such importance to the jurisprudence of the state*, as in the opinion of the Supreme Court requires correction." *Id.* at 12, quoting Act of July 1, 1917, ch. 75, § 1, 1917 Tex. Gen. Laws 140,

140-41 (emphasis in article). The purpose of this amendment was to give "the Supreme Court of Texas . . . discretionary power to grant applications upon consideration of general jurisprudential interests." *Id.* at 13. Both bench and bar expressed considerable opposition to this discretionary review power, however, and "[t]he experiment came to an end in 1927 when the discretionary review language [*i.e.*, the reference to jurisprudential importance] was removed from [the statute]." *Id.* at 16.

For the next 60 years, the Texas Supreme Court struggled to cope with a system of wholly mandatory jurisdiction. During this time, the court evolved three formal notations for denial of review on application for writ of error: "The application may be 'Dismissed' (whether for want of jurisdiction, mootness or by agreement of the parties), it may be 'Refused,' or it may be 'Refused, No Reversible Error.'" Robertson & Paulsen at 26. Whereas "'Writ Refused' . . . mean[s] that 'the judgment of the Court of Civil Appeals is a correct one and . . . the principles of law declared in the opinion are correctly determined,'" *id.* at 19-20, quoting Law of June 14, 1927, ch. 144, § 1, 1927 Tex. Gen. & Spec. Laws 214, "in current practice an 'N.R.E.' can mean virtually anything." *Id.* at 27.[2]

The pervasive ambiguity of the notation "writ refused n.r.e." had two sources. First, even in cases where the opinion of the court of appeals was correct in every respect, the "n.r.e." notation would be used if the application for a writ of error had not met certain technical requirements. Robertson & Paulsen at 30-32. Second,

> even if all formal requirements for refusal are met, failure to "Refuse" the application may not be a negative comment on the lower court decision. As

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[2] Exxon's reply brief in support of the petition for a writ of certiorari mistakenly transposed the meanings of "writ refused" and "writ refused n.r.e." Exxon Reply Br. 5.

> Justice Simpson observed: "It may be that the court, being satisfied as to the correctness of the judgment, did not consider the questions discussed of sufficient novelty or importance to warrant the 'fine-tooth comb' treatment essential to an unqualified approval of an opinion."

Id. at 33 (footnote omitted).

"In summary, the 'N.R.E.' notation could mean that the court of appeals' opinion is very good, since a perfectly faultless opinion may for one reason or another not be marked 'Refused.' " Robertson & Paulsen at 34. On the other hand, the notation also could apply "to decisions riddled with [harmless or] unpreserved error." *Id.* at 37. The meaning of the "n.r.e." notation thus "is often undecipherable in the context of a particular case," *id.* at 59, even though it referred to an action that, because it represented an exercise of mandatory jurisdiction, "is in every sense a decision on the merits." *Id.* at 26. Consequently, Justice Robertson called for the abandonment of mandatory jurisdiction and the confusing system of notation that it had spawned. He argued strongly that the time had come for the adoption of a system of discretionary review. *Id.* at 59-73.

Justice Robertson struck a responsive chord. The Texas legislature acted with alacrity to confer discretionary review powers on the Texas Supreme Court, and it did so by restoring to the jurisdictional statute virtually the same language that it had used for the same purpose in 1917. *See* Carlson & Garcia at 1203. The court promptly made a conforming change in the appellate rules, deleting the "n.r.e." notation and replacing it with the new notation "writ denied." Tex. R. App. P. 133(a).

The new statute, like its predecessor, describes the court's jurisdiction in terms of cases "in which it appears that an error of law has been committed." Act of

June 19, 1987, ch. 1106, § 1, 1987 Tex. Sess. Law Serv. 7649, 7650 (Vernon). Similarly, new Tex. R. App. P. 133(a), like its predecessor, speaks in terms of "cases where the Supreme Court is not satisfied that the opinion of the court of appeals in all respects has correctly declared the law." Paribas seizes upon these archaic formulations to argue that the new notation "writ denied" necessarily means that the lower court's decision was erroneous. It may be conceded that the statute and rule are not felicitously phrased. But it is beyond question that, with minor differences not relevant here, the notation "writ denied" represents a continuation of the former "n.r.e." practice in the context of discretionary rather than mandatory review. Because not even the "n.r.e." notation signified the existence of error, *a fortiori* the notation "writ denied" does not do so. The very article cited by Paribas explains:

> in Texas under the new discretionary review a "writ denied" merely means that for whatever reason, four justices did not vote to "grant" the case. . . . [I]t may very well be that the court of appeals opinion presents no reversible error . . . .

Carlson & Garcia at 1202.

In short, the Texas Supreme Court may "refuse" an application for writ of error, which is equivalent to summary affirmance in this Court; or it may "deny" the application, which is analogous to this Court's denial of certiorari. Like a denial of certiorari, the notation "writ denied," which the Texas Supreme Court employed in denying review in *Kerr Construction*, casts no aspersions whatsoever on the opinion of the lower court. It signifies a purely discretionary denial of review indistinguishable from that employed by the highest courts of all the other 32 states that have intermediate courts of appeals. *See* Robertson & Paulsen at 2 n.5.

B. Denial Of Review Establishes *Kerr Construction* As The Dispositive Statement Of Texas Law For Purposes Of This Diversity Litigation

In *Hicks v. Feiock*, 108 S. Ct. 1423, 1428 (1988), this Court stated that where the highest court of a state has exercised its discretion to deny review of a decision of an intermediate court of appeals, a federal court is "not at liberty to depart from the state appellate court's resolution of these issues of state law." In support, the Court quoted the following passage from *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237-38 (1940) (emphasis added):

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. . . . *This is the more so where, as in this case, the highest court has refused to review the lower court's decision* rendered in one phase of the very litigation which is now prosecuted by the same parties before the federal court. . . . Even though it is arguable that the Supreme Court of [the state] will at some later time modify the rule of [this] case, whether that will ever happen remains a matter of conjecture. In the meantime *the state law applicable to these parties and in this case has been authoritatively declared by the highest state court in which a decision could be had.* . . . We think that the law thus announced and applied is the law of the state applicable in the same case and to the same parties in the federal court and that *the federal court is not free to apply a different rule however desirable it may believe it to be, and even though it may think that the state Supreme Court may establish a different rule in some future litigation.*

See also Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940) (diversity courts have a particular obligation to follow the decision of a state intermediate appellate court where that "court has determined the precise question in issue . . . and the highest court of the state has refused review").

To be sure, *Hicks*, *West*, and *Stoner* are different from this case. In each of those cases, the state litigation had involved the same parties who were before the federal court (and *Hicks* itself came before this Court on direct review of the state decision). But this distinction does not point to a different conclusion concerning the deference due to a state intermediate appellate decision that the state's highest court has deliberately let stand. In diversity litigation, such a decision should be accepted as a dispositive and governing pronouncement of state law where, as here, it is not directly contrary to a decision of the state supreme court or that of any other intermediate appellate court within the state. This is so for two important reasons.

First, such a rule of deference serves the ends of both comity and convenience. Federal courts' defeernce to state appellate decisions that have been denied review reflects a suitable recognition of state appellate courts' superior competence in matters of state law. It also frees the federal courts from having to rethink questions of state law in cases essentially identical to those already adjudicated by the state courts.

Second, such a rule of deference would appear to be a necessary corollary of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Although a state supreme court's discretionary denial of review may not express unqualified approval of the lower court's decision, it does dispositively fix the result actually reached in parallel state litigation. The same result also should be reached in federal court: "[t]he nub of the policy that underlies *Erie* . . . is that

for the same transaction the accident of a suit by a nonresident litigant in federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Deference appears particularly appropriate here. Although as a technical matter denial of review in *Kerr Construction* constituted an expression of neither approval nor disapproval, it is reasonable in the circumstances to infer that the Texas Supreme Court in fact approved of the result in that case. The issuing bank in *Kerr Construction* called the Texas Supreme Court's attention to the contrary decision of the Fifth Circuit in this case. *See* Paribas Br. 10A. In view of this evident conflict, if the court had believed that the Fifth Circuit's decision was correct, or that the decision of the lower court in *Kerr Construction* was questionable, presumably it would have acted on that belief by reversing or granting plenary review. Because the court instead deliberately let stand the result in *Kerr Construction*, Exxon should be granted the benefit of the same legal rules that governed the litigants in that case.

III. *KERR CONSTRUCTION* MUST BE FOLLOWED FOR THE ADDITIONAL REASON THAT THERE IS NO CONVINCING EVIDENCE THAT THE TEXAS SUPREME COURT WOULD REACH A CONTRARY RESULT

Paribas argues that the decision below was correct, and the decision in *Kerr Construction* incorrect, as a matter of Texas law. Paribas Br. 13-19. That argument not only errs in its analysis of Texas legal principles but also misconceives the role of a federal diversity court in applying state law. Even if no application for a writ of error had been filed and denied in *Kerr Construction*, that decision would govern here.

Paribas begins by suggesting that, in the absence of an authoritative decision by the state supreme court, a fed-

eral diversity court is free to decide an issue of state law largely as a matter of first impression. Paribas Br. 13-14. Paribas relies upon two cases, *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967), and *King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), which explain that a diversity court need not treat an unreviewed decision of a state *trial* court as controlling. But in *Bosch* (as in last Term's decision in *Hicks*) the Court expressly reaffirmed the statement in *West*, 311 U.S. at 237, that the decision of "an intermediate appellate state court . . . is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *See* 387 U.S. at 465.

Neither *Bosch* nor any other more recent decision of this Court disturbs the rule that "[a]n intermediate state court['s determination] in declaring and applying the state law . . . , in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940). *See also Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986) ("in the absence of a direct holding by the highest court in a state, we should defer to the holdings of lesser courts unless we are *convinced* by other evidence that the state law is otherwise") (emphasis added). This rule of decision places a heavy burden of persuasion on the party that seeks to avoid application of a ruling by a state intermediate appellate court. Paribas has not carried that burden.

The Fifth Circuit, of course, did not apply the rule of decision articulated in *West* and *Fidelity Union Trust*. Because the court refused to consider *Kerr Construction*, it had no occasion to determine whether other sources of authority constituted "more convincing evidence of what the state law is." *Fidelity Union Trust*, 311 U.S. at 178.

That consideration, in and of itself, renders the court's decision fundamentally unsound as a matter of federal diversity practice. Moreover, if the court had undertaken to make the determination required by such cases as *West* and *Fidelity Union Trust*, it would have been forced to conclude that *Kerr Construction* controls this case.

Atlhough Paribas asserts that "[t]he Fifth Circuit comprehensively evaluated and applied Texas law to resolve the issues presented to it," Paribas Br. 14, that is manifestly not true. Whereas Paribas now cites and discusses a total of *thirteen* Texas decisions, *id.* at 15-19, the Fifth Circuit itself cited only *two*—one at the end of a string cite, J.A. 70 n.7, and the second as an unexplained "cf." cite. J.A. 73 n.18. It is evident from the court's opinion that the panel majority did not decide the case on the basis of an analysis of Texas authorities. If the majority had "comprehensively evaluated" the existing body of Texas law, it would have concluded, even apart from *Kerr Construction*, that, as Judge Garza stated in his dissenting opinion, "the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct." J.A. 76. *Cf. Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 (1956) ("[s]ince the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what Vermont law is").

The result in *Kerr Construction* was dictated by well-established Texas rules of contract construction. *See* Exxon Br. 16-19. Paribas argues as if these rules do not apply to letters of credit, which Paribas appears to suggest are subject to different and special rules of construction under Texas law. That suggestion is manifestly incorrect. "Letters of credit are governed by the con-

struction rules of ordinary contracts." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). Letter-of-credit cases do not constitute a separate and hermetically sealed body of Texas jurisprudence, and the *Kerr Construction* court did not err in applying ordinary contract principles to that case.

In any event, the letter-of-credit cases that Paribas cites do not address the question of Texas law presented by this case and decided in *Kerr Construction*. At most, the cases announce principles that govern other types of disputes concerning letters of credit; those principles are fully consistent both with the rules of contract construction applied in *Kerr Construction* and with the actual result in that case.

Paribas relies centrally upon the statement that a beneficiary, such as Exxon, must " 'strictly comply with the terms and conditions of the letter of credit.' " Paribas Br. 16, quoting *Fina Supply, Inc. v. Abilene National Bank*, 726 S.W.2d 537, 542 (Tex. 1987). But that statement, read in context, describes the duty of the beneficiary to present documents that strictly conform to the documentation required by the certification provision of a letter of credit. That duty is important because "the issuer has a *primary* obligation that is dependent *solely* upon presentation of conforming documents and not upon the factual performance or nonperformance by the parties to the underlying transaction." *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 115 (Tex. 1979) (emphasis in original). The duty to present conforming documents is not at issue here. It is undisputed that Exxon presented conforming documents (and thus the question that Paribas seeks to raise concerning its ability to claim reimbursement from Houston Oil, *see* Paribas Br. 17, does not arise).

Nor is this a simple case of a beneficiary failing to make a timely presentation of documents prior to the expiration date. *Cf.* Paribas Br. 16-17. Instead, the ques-

tion of Texas law in this case, as in *Kerr Construction*, is whether a letter of credit will be construed and enforced in a manner that renders the beneficiary's performance impossible and thereby renders the undertaking for which the issuing bank has charged a fee illusory and meaningless. No case cited by Paribas addresses this question. The Texas Supreme Court, however, has given fair warning that a letter of credit will not be construed in the manner for which Paribas argues here. It has instructed on several occasions that a letter of credit should not be read in a manner "that renders its performance impossible or meaningless." *Temple-Eastex*, 672 S.W.2d at 798. *Accord*: *Republic National Bank*, 578 S.W.2d at 115. *See also Breathless Associates v. First Savings & Loan Ass'n*, 654 F. Supp. 832, 836 (N.D. Tex. 1986) ("[t]he Texas Supreme Court indicated in *Westwind* [*Exploration, Inc. v. Homestead Savings Ass'n*, 696 S.W.2d 378, 392 (Tex. 1985),] that constructions of a letter [of credit] that would make performance impossible should be avoided").

Paribas nevertheless argues that courts in other jurisdictions "have uniformly held that the impossibility of compliance with conditions of a letter of credit prior to its expiry date is not grounds for ignoring or changing that date." Paribas Br. 18. The decisions that Paribas cites do not stand for that proposition. In *Liberty National Bank & Trust Co. v. Bank of America National Trust & Savings Ass'n*, 218 F.2d 831 (10th Cir. 1955), for example, the effect of the expiration date was simply to make the letter of credit inapplicable to a shipment that had not been delivered as of that date; the letter remained applicable to a shipment that had been delivered earlier. Similarly, there was no inconsistency or impossibility in *Hyland Hills Metropolitan Park & Recreational District v. McCoy Enterprises, Inc.*, 554 P.2d 709 (Colo. Ct. App. 1976); the letter of credit at issue there required only that the beneficiary submit a

signed statement that a tennis court had not been constructed on or before the expiration date. Indeed, there appears to be no decision in any court, other than the Fifth Circuit's decision here, that enforces an expiration date that literally renders the issuer's undertaking illusory and meaningless.

Paribas' remaining arguments concerning Texas law are insubstantial. The decision in *Kerr Construction* did not constitute a judicial "modification" or "reformation." Paribas Br. 17, 18. It involved the construction of an internally contradictory contract, and the contradiction was resolved by construing the letter of credit as permitting presentation of documents on the last date given in the certification provision for performance of the underlying contract. This construction conformed with the rule that "[i]n Texas, a writing is generally construed most strictly against its author . . . . As a result, the bank's letter of credit is construed most strictly against the bank because it drafted the letter of credit." *Temple-Eastex*, 672 S.W. 2d at 798. *See also, e.g., Willow Bend National Bank v. Commonwealth Mortgage Corp.*, 722 S.W.2d 12, 13 (Tex. App. — Dallas 1986, writ ref'd n.r.e.). Paribas suggests that this rule should not be applied here because its customer Houston Oil had supplied "the essential language used in the letter of credit." Paribas Br. 19 n.14. It may be assumed that the customer normally supplies the terms. This does not, however, excuse the issuing bank from the rule of strict construction stated in *Temple-Eastex*. Moreover, Paribas' suggestion that a bank may be relieved of its entire contractual obligation merely because it deliberately drafted an internally contradictory letter of credit, *see* Paribas Br. 19, must be rejected as grossly inequitable.[3]

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[3] Finally, Paribas argues that *Kerr Construction* should not be followed here because of minor factual differences between the two cases. Paribas Br. 23. Those factual differences, however, are truly insignificant; they have no bearing upon the application of the legal principles that the court in *Kerr Construction* found controlling.

In summary, *Kerr Construction* was correct as a matter of Texas law. A diversity court need not, however, actually determine the correctness of a decision such as *Kerr Construction*. It need determine only that there is no "convincing evidence" that the decision was incorrect. *Fidelity Union Trust*, 311 U.S. at 178. Because Paribas has presented no such convincing evidence, *Kerr Construction* must be followed in this case.

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for reconsideration in light of Texas law, including the decision in *Kerr Construction*, or the question of Texas law should be certified to the Texas Supreme Court.

Respectfully submitted,

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